82-721

No.

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In The

Supreme Court of the United States

October Term, 1982

JAMES C. GABRIEL, Pro Se,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does petitioner have a right to own property, to have his own personal property evaluated under due process of law, according to the Fifth and Fourteenth Amendments to the United States Constitution?

2. Does petitioner have the right to a jury trial, to have the jury evaluate his MoPac Class B shares under due process of law according to the Fifth and Fourteenth Amendments, without having a judge give his Rule 38 jury trial of right, (a) right preserved complaint to a magistrate to have the magistrate recommend that plaintiff has no right to evaluate his property under due process of law which is what the magistrate does to petitioner's property when the magistrate recommends that petitioner cannot sue in a federal court the defendants with any complaint that deals with the 1974 recapitalization, when that 1974 recapitalization is the guts of case, which controls the due process higher valuation in the 1974 recapitalization plan?

3. Did not the court of appeals err when it denied appellant's motion and affidavit notarized on March 17, 1982, when appellant had motioned the court for permission to submit to the court the reply brief of over 50 pages of meticulous findings to service the Internal Revenue Service Fraud Section and the Attorney General Office Fraud Section of the Justice Department both in Washington, D.C.?

4. Did not the court of appeals err when, on plaintiff's notarized motion and affidavit dated May 16, 1982, it refused to have itself and the defendants Missouri Pacific R.R. Co. of Missouri, service the Commissioner of the I.R.S., Mr. Roscoe Eggers, Fraud Section and Mr. William French Smith of the U.S. Justice Department, when plaintiff by motion exposed the fact that MoPac owed the I.R.S. many millions of dollars in capital

gains taxes for the transfer of over 61% of MoPac Class B stockholders cash and property value in a planned step by step conspiracy to defraud the United States under Section 371, Title 18, Chapter 19 because of the tens of millons of dollars owed to the U. S. Government I.R.S.?

5. How can a federal magistrate deny petitioner an evaluation of his Class B common stock property under due process of law of the Fifth and Fourteenth Amendments by taking a jury demand complaint under Rule 38 and make the jury trial a magistrate's case without the consent of the plaintiff?

6. Did not the court of appeals err when on June 30, 1982 it adjudged and ordered that the judgment of the district court be and is hereby affirmed, with costs taxed against appellant when appellant had appealed to the court by motions, by a brief, and reply brief that his jury trial demand was made into a magistrate's case by a judge without plaintiff's consent?

7. Has the Interstate Commerce Commission the constitutional right under the Fifth and Fourteenth Amendments and under the I.C.C. Code of Ethics to help take away the over 61% values of Class B without giving the Class B its equivalent values surrendered in a solvent prosperous railroad company such as MoPac was in 1973 when even Commission Division 3 admitted in the I.C.C.'s December 6, 1973 decision, it is not disputed that should the new preferred shares be converted into new common, as contemplated in the plan, the equity position of the Class B stockholders would be reduced from 61½% to 25½%.

8. What constitutional right did the Weinfeld Court have to have a MoPac Plan of Recapitalization under a Class B action Rule 23(a)(4) and (b) and under Rule 23(a), (b)(1) and (b)(2) F.R. of C.P. when Allegheny Corp. had a conflict of interest in regards to its Jones Motor Co. Transaction No. MC-F-1044, and

Allegheny Corp., as a Class B minority stockholders' representative in this class action plan had kept these salient facts a secret from its minority stockholders it represented?

9. What constitutional right did the Weinfeld Court have to have a MoPac Plan of Recapitalization under Class Action Rule 23 when Robert LeVasseur, as a Class B representative of the Class B minority stockholders possessed at the time of the Plan of Recapitalization 3,000 MoPac Class A shares and 336 Class B shares. LeVasseur kept the fact a secret of owning Class A and Class B at the same time. This was a conflict of interest.

10. How could there be *res judicata* in a jury trial complaint when plaintiff seeks due process evaluation of his property under the Fifth and Fourteenth Amendments, when there is present fraud, conflicts of interest and the hiding of important facts from the minority Class B stockholders in a class action under Class Action Rule 23(a), (b)(1) and (b)(2) of F.R.C.P. and Class Action Rule 23(a)(4) and (b), when the representative parties, such as Allegheny Corporation and Robert LeVasseur did not protect the interests of the class?

11. Does not the Sixteenth Amendment to the Federal Constitution also apply to a large corporate structure such as the Missouri Pacific Railroad Company when the railroad owes many tens of millions of dollars in capital gains taxes to the I.R.S. for the transfer of 61% of the Missouri Pacific R.R. Class B common stockholder's cash and property values to its own MoPac Class A $5 preferred $100 value stocks without MoPac having paid taxes to the I.R.S. for these Class B values it transferred to the Class A?

12. Isn't it fraudulent to use a Section 20(a) of the Interstate Commerce Act to recapitalize a railroad when Section 20(a) [49 U.S.C. §20(a)] is for "Issuance of Securities of Carriers"?

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No.

In The

Supreme Court of the United States

October Term, 1982

JAMES C. GABRIEL, Pro Se,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner James C. Gabriel, Pro Se, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit entered in this case on June 30, 1982 in favor of the respondents. A petition for rehearing was denied on July 27, 1982.

OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit sur petition for rehearing by appellant dated July 27, 1982 appears on page 1a of the Appendix, *infra.*

JURISDICTION

The judgment order of the Court of Appeals herein was entered on June 30, 1982.

The sur petition for rehearing by the court en banc filed by apellant was denied and was entered July 27, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), the jurisdiction below having been based on diversity of citizenship, 28 U.S.C. §1332(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment — "No person shall be deprived of life, liberty or property, without due process of law."

Fourteenth Amendment — "Nor shall any state deprive any person of life, liberty or property without due process of law."

I.C.C. Finance Docket No. 27346;

67 Civil 5095 — *Levin v. Mississippi River Corp.*, S. Div. N.Y. Foley Square;

Title 28 U.S.C.S. §517, Interests of U.S. in Pendency Suits;

Conspiracy to Defraud United States Title 18, Section 371, Chapter 19;

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 722, 64 S. Ct. 1281;

Class Actions Rules 23(a)(1)(2)(3)(4);(b); (b)(1); and (b)(2);

Sanders v. United States, 373 U.S. 1-8, 83 S. Ct. 1068;

Section 20(a) [49 U.S.C. §20(a)] of the Interstate Commerce Act;

Section 20(b) [49 U.S.C. §20(b)] of the Act;

Beacon Theatres v. Westover U.S. District Judge, et al., 358 U.S. 500, 356 U.S. 956;

Dimick v. Schiedt, 292 U.S. 474, 486.

STATEMENT OF THE CASE

Petitioner seeks to have his jury trial of right Rule 38 civil complaint case reinstated as a jury trial complaint in the District Court of New Jersey, Newark, New Jersey and to have the Court set aside the order of Judge H. Lee Sarokin dated April 7, 1981, who had ordered the report and recommendation of Magistrate Perretti, filed December 31, 1980 by the magistrate, be adopted as the opinion of the Sarokin court whereby the report by Perretti had ordered that plaintiff be permanently enjoined from instituting any suit in the federal courts against any of the defendants or any other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

Petitioner respectfully requests that the report and recommendation of Magistrate Perretti be denied by the Court because it violates petitioner's Civil No. 78-1476 jury trial complaint and for due process evaluation of petitioner's Class

B common shares be reinstated as a jury trial according to Rule 38 Jury Trial of Right — (a) Right preserved."The right of trial by jury as declared by the Seventh Amendment to the Constitution of the United States or as given by a statute of the United States shall be preserved to the parties inviolate"; (d) Demand — "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." Petitioner did not consent to have his jury demand complaint withdrawn, and therefore his complaint must be reinstated as a jury trial.

Petitioner, *pro se,* on behalf of himself, is appealing from the order, findings of fact, conclusions of law of Hon. Frederick B. Lacey, U.S.D.J., of the United States District Court, District of New Jersey, Newark, New Jersey, original filed in the Clerk's Office on July 23, 1981, which was a denial by the Lacey court for appellant to get a jury trial for the jury to direct the court to order the I.C.C. to evaluate appellant's property in Missouri Pacific Railroad Class B Common shares according to Section 19(a) [49 U.S.C. §19(a)] of the Interstate Commerce Act — "Evaluation of Property of Carriers" so that the I.C.C. finds the true value of appellant's Class B shares under due process of law according to the Fifth and Fourteenth Amendments, the values to be relayed to the Missouri Pacific R.R., which would issue appellant stock equal in value to the Class B appellant gave them — equal Class B values given for equal new MoPac values received in return. Appellant respectfully pleads that his Civil No. 78-1476 jury trial case be reinstated in the District Court, Newark, New Jersey as a jury trial case, according to Rule 38, Jury Trial of Right. — (a) Right Preserved. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." (d) Waiver. — "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Appellant entered his complaint — Civil No. 78-1476 jury trial, as a jury trial demand case and appellant wants it kept as a jury trial case.

In *Beacon Theatres v. Westover U.S. District Judge et al.,* certiorari to the U.S. Court of Appeals for the Ninth Circuit Mr. Justice Black delivered the opinion of the court.

> "We granted certiorari 356 U.S. 956 because maintenance of a jury trial as a fact finding body is of such importance that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt,* 293 U.S. 474, 486.

Rule 38. Jury Trial of Right — (a) Right preserved — "The right of trial by jury as declared by the Seventh Amendment or as given by a statute of the United States shall be preserved by parties inviolate" which is plaintiff's demand of trial by jury, which shall be in conformity with plaintiff's complaint, filed July 3, 1978, jury demand of plaintiff filed July 13, 1978, Civil No. 78-1476 Jury Trial.

(d) Waiver. — "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." Petitioner did not consent to have his jury trial withdrawn and made into a magistrate's case. The Honorable Sarokin court, in the United States District Court, District of New Jersey in Newark, N.J. had no constitutional right to deprive plaintiff Gabriel, *pro se,* of plaintiff's jury trial of right case - Civil No. 78-1476 Jury Trial Case, and give it to a magistrate to "report and recommend" simply because Judge Sarokin had a "heavy case load." Therefore, petitioner Gabriel respectfully prays that plaintiff's jury trial complaint be reinstated in the District Court of New Jersey as a jury trial case, or that the Supreme Court

orders the I.C.C. to evaluate petitioner's Class B MoPac stocks under due process of law according to the Fifth and Fourteenth Amendments and Section 19 of the Act, to find true value of MoPac Class B stocks.

It is an uncontested fact that there never has been a due process evaluation of the MoPac Class common stock.

REASONS FOR GRANTING THE WRIT

This is a constitutional question. The granting of the writ will restore petitioner Gabriel's constitutional rights under the Fifth and Fourteenth Amendments to due process evaluation of his Class B common stock property.

1. Petitioner is a dissenter Class B stockholder of the Missouri Pacific Railroad Co. (MoPac), who on June 15, 1973 voted against the approval of the Plan of Recapitalization of MoPac under a Section 20(a) proceeding because (1) the "Plan" offered a reduction of ownership to the common Class B only, 25.5% from its 61.5% ownership and to the Class A $5 preferred an increase to 74.5% ownerhsip from its 34.5%, of the consolidated stockholders equity of the company on an I.C.C. accounting basis. *See* 347 I.C.C. pages 397-398; because (2) Section 20(a) [49 U.S.C. §20(a)] of the Interstate Commerce Act is for "Issuance of Securities of Carriers (capital stocks or bonds or evidence of indebtedness; (3) Section 20(b) [49 U.S.C. §20(b)] is for "Modification of Railroad Financial Structures" whereby under Section 20(b)(2) the proposed alteration or modification (c) will be in the best interests of the carrier, of each class of its stockholders.

2. Petitioner respectfully prays that this Court grants him a writ of certiorari in order to help vacate the magistrate's report and recommendation which is against petitioner's constitutional

rights of due process of law evaluation of his Class B MoPac common stock property under the Fifth and Fourteenth Amendments: "No person shall be deprived of life,liberty, or property without due process of law". It will also vacate Judge H. Lee Sarokin's April 7, 1981 order and Judge Frederick B. Lacey's order of July 22, 1981, both of which are based upon Magistrate Perretti's report and recommendation.

The Perretti report and recommendation permanently enjoins plaintiff from instituting any suit regarding any matter "alleged in the complaint that deals with the 1974 recapitalization. The 1974 recapitalization of MoPac of December 3, 1972 gives Class B only 25.5% of the consolidated equity of the company on an I.C.C. accounting bases from its 61.5% of Class equity as the holder of the residual rights of the assets of the company and gives the Class A $5 preferred an increase to 74.5% of such stockholders' equity from its 34.5%. The magistrate's report and recommendation, if petitioner is permanently enjoined, means that petitioner cannot sue against the 1974 recapitalization in order to get a due process evaluation of his Class B MoPac common stock property under the Fifth and Fourteenth Amendments of the U.S. Constitution to find Class B true value, in order to exchange Class B true value for new MoPac common stock. This is according to the United States Supreme Court in *Schwabacher v. United States, et al.*, 334 U.S. 182 (1948). The Interstate Commerce Commission's decisions show that Section 20(b) are the proper precedents to follow in such a proceeding, that stockholders are entitled to securities under Section 20(b) based on their contribution to or investment value in the company, the investment value rule applied by the Supreme Court in the *Schwabacher* and *Otis* cases. *Otis & Co. v. S.E.C.*, 323 U.S. 624 (1945). ["The proposed alteration or modification will be in the best interests of the carrier, of each class of its stockholders." Section 20(b)(2)(c)].

3. The granting of the writ will eventually enable petitioner to get due process evaluation of his Class B common stocks by the Supreme Court ruling that the Interstate Commerce Commission evaluate Class B common stocks under due process of law by the I.C.C. by following the Fifth and Fourteenth Amendment to the Federal Constitution, and under Section 19(a) [49 U.S.C. §19(a)] of the Act — "Evaluation of Property of Carriers", to find Class B true value, so that this true value will enable the U.S. Government I.R.S. to have the true value become the basis of the value of Class B common, upon which value the I.R.S. will become enabled to calculate how much of the Class B value was transferred to the Class A $5 preferred, based upon the I.C.C.'s figures that Class B value in the"Plan of Recapitalization", went from 61.5% to 25.5% (347 I.C.C. pages 397, 398).

At the present time without a due process evaluation of Class B under the Fifth and Fourteenth Amendments to find Class B true value the Sixteenth Amendment cannot be enforced against MoPac for the transfer of Class B ownership from its 61.5% ownership to only 25.5% ownership, when at the same time the Class A $5 preferred had an increase of ownership from 34.5% to 74.5% of the consolidated stockholder's equity on an I.C.C. accounting basis. (347 I.C.C. pages 397-398).

CONCLUSION

For the many reasons stated,

1. Petitioner respectfully recommends that this Court rule against the report and recommendation of Magistrate Serena Perretti filed on December 31, 1980 who had dismissed plaintiff's complaint because he seeks due process. Her report is unconstitutional, it is against due process of law evaluation under the Fifth and Fourteenth Amendments of petitioner's Class B property. She denies appellant has any right to sue defendants for due process evaluation.

2. That this Honorable Court rule that this case goes to the District Court in Newark, N.J. for jury trial, for the jury, to direct the judge to order the Interstate Commerce Commission evaluate petitioner's Class B equity bearing Class B common shares under due process of law, according to Section 19(a) for the "Valuation of Property of Carriers." According to 290 I.C.C. 477, at pages 624 and 625, the Class "B" stock was awarded only a small amount in actual par value but it was made the "residuary beneficiary" of the Missouri Pacific Railroad Co., heir to 16,738,413 acres of land grants, fabulously by rich in reserves of natural gas, oil, coal and trivia. This is one of the reasons why Union Pacific seeks to merge with Missouri Pacific Railroad Company and Missouri Pacific Corporation, as brought out before the Interstate Commerce Commission in Finance Docket Nos. 30,000 et al., Union Pacific Corporation, Pacific Rail System — Control — Missouri Pacific Corporation and Missouri Pacific Railroad Company — Control — Western Pacific R.R. Co.

3. Petitioner respectfully recommends the denial, the rejection of the order of Hon. Frederick B. Lacey of the United States District Court of the District of New Jersey dated July 22, 1981

and of Judge H. Lee Sarokin dated April 7, 1981 who had adopted the report and recommendation of Magistrate Perretti filed December 31, 1980 as the opinion of his court, dismissing petitioner's complaint and who had permanently enjoined plaintiff from instituting any suit in the Federal Court (for any suit for due process evaluation of Class B would be such a suit) against any defendants, corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 Recapitalization, because that order of Sarokin is unconstitutional and against due process of law evaluation of my Class B property under the Fifth and Fourteenth Amendments because if I was permanently enjoined from instituting any suit in the Federal Court against any of these defendants or any other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 Recapitalization, then I cannot sue the company for due process evaluation of my Class B because that would be suing against the 1974 Recapitalization of $214.50 per Class B share.

Respectfully submitted,

JAMES C. GABRIEL
Petitioner Pro Se

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 30, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2676

JAMES C. GABRIEL,

Appellant

v.

Missouri Pacific Railroad Co., et al.

(Civil No. 78-1476 - D.N.J. - Newark)

Submitted Under Third Circuit Rule 12(6)
June 16, 1982

BEFORE: SEITZ, Chief Judge, HIGGINBOTHAM, and BECKER, Circuit Judges.

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

s/ Seitz
Chief Judge

ATTEST:
s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: June 30, 1982

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 27, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2676

JAMES C. GABRIEL,

Appellant

v.

MISSOURI PACIFIC RAILROAD CO., ET AL.,

(Civil No. 78-1476 - D.N.J. - Newark)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Chief Judge

ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED JULY 22, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, NEW JERSEY

Civ. No. 78-1476

JAMES C. GABRIEL, Pro Se,

Plaintiff,

-against-

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M. M. HENNELLY, JOHN H. LLOYD, D. B. JENKS and THOMAS J. O'LEARY,

Defendants.

FINDINGS OF FACT
CONCLUSIONS OF LAW

Plaintiff's motion, dated June 15, 1981, his 4th motion for reconsideration of Judge Sarokin's Order of April 7, 1981, was reassigned to the undersigned by Order of the Court, inasmuch as plaintiff, after Judge Sarokin had denied his three previous motions for reconsideration of the April Order, filed with the instant motion a claim against Judge Sarokin for an alleged deprivation of rights in the amount of $35,000,000.

Judge Sarokin's Order adopted, as the Opinion of the Court, Magistrate Perretti's Report and Recommendation filed December 31, 1980 (hereinafter "Report"). That Report, containing findings

of fact and conclusions of law, is incorporated herein with the same force and effect as if set forth in full.

Plaintiff has appeared *pro se* throughout. At oral argument it was stated by defendants' counsel, and not denied by plaintiff, that his stock involved in this action has a present market value of $2,200,000, and accumulated dividends (which plaintiff has not collected) aggregating $1,100,000.

I have reviewed the extended file in this matter, and heard full oral argument on July 13, 1981. I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff owns what was formerly Class B stock of defendant Missouri Pacific Railroad Company (MoPac). He filed this complaint for declaratory and injunctive relief on July 3, 1978. Jurisdiction was based on diversity.

2. Plaintiff demanded declaratory relief on four issues, (1) declaring that the B stock (allegedly owned by plaintiff) was entitled to vote as a class, (2) fixing the valuation of the B shares according to a formula contained in a certain agreed systems plan, (3) interpreting a certain opinion of the United States Supreme Court as being controlling in the instant matter and (4) declaring that the Interstate Commerce Commission Act may not be used to defraud the holders of class B stock in MoPac.

3. By a recapitalization plan of MoPac consummated in January 1974, each share of Class B stock owned by plaintiff and others was converted into new common stock. The recapitalization was made pursuant to:

Order

a. A judgment of the United States District Court approving the transaction in a class action in which plaintiff actively participated (Leighton, Ex. A); *Levin v. Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973), "affirmed on Judge Weinfeld's opinion below" (Ex. B), *sub nom. Wesson v. Mississippi River Corporation,* 486 F. 2d 1398 (2d Cir. 1973), cert. den. *sub. nom. Wesson v. Levin,* 414 U.S. 1112 (1973), rehearing denied 415 U.S. 937 (1974). See Report, pp. 16-18.

b. An order of the Interstate Commerce Commission authorizing the recapitalization, pursuant to 49 U.S.C. §20a (Ex. C), in a litigated proceeding in which plaintiff actively participated. *Missouri Pac. R. Co. Securities,* 3471 I.C.C. 377 (1973), rehearing denied (Ex. D), petition for finding that an issue of general transportation importance is involved denied (Ex. E). That order was affirmed (Ex. F) *sub. nom. Gabriel v. United States,* 416 F. Supp. 810 (D. N.J. 1973 [three-Judge Court, Hunter C.J., Whipple & Fisher, D. JJ., opinion by Fisher, J.]), reargument denied (Ex. G), reconsideration denied (Ex. H) [illegible]rgument denied (Exh. I), reargument denied (Ex. J). This Court's order (Ex. F) was affirmed. 429 U.S. 1011 (1976), rehearing denied, *ibid.* 1124 (1977). The Commission's order was also affirmed, *sub. nom. Gillespie v. United States,* [unreported], Civil Action No. 74-239-C(2) (E.D. Mo. 1974 [three-Judge Court, Webster, C.J., Wangelin and Regan, D. JJ.]). (Ex. K). See Report, pp. 18-20.

4. Defendants moved to dismiss this claim for declaratory judgment, pursuant to Fed. R. Civ. P. 56(b), on the ground that the foregoing District Court judgment and the Interstate Commerce Commission Order are *res judicata* (Report p. 3). The Report says (p. 21):

Order

"It is clear beyond argument that all of the issues in this complaint which related to the 1974 recapitalization are res judicata";

See fuller discussion at pp. 15-21.

5. Plaintiff's other claim sought to enjoin defendants temporarily and permanently, from taking any further steps for approval or consummation of the September 1, 1977 'Plan and Joint Agreement of Merger, Consolidation and Recapitalization of MoPac'" (Prayer for Relief, paragraph 1; see Report p. 2). The Plan filed with the Interstate Commerce Commission pursuant 49 U.S.C. § 20a, sought approval of the exchange of stock of defendant Missouri Pacific Corporation for all of the outstanding minority shares of MoPac (Report pp. 6-8).

6. Defendants moved to dismiss this claim, pursuant to Fed. R. Civ. p. 12(b)(1), for lack of subject matter jurisdiction, on the ground that plaintiff had not exhausted his administrative remedies (Report p. 3). The Report recommended that dismissal be granted on this ground (pp. 10, 24; see fuller discussion at pp. 8-15).

7. Defendants also moved to enjoin plaintiff permanently from instituting proceedings against defendants on the facts alleged in the complaint, on the ground that any such proceedings would be vexacious (Report p. 3). The Report recommended granting such an injunction (P. 24; see fuller discussion at pp. 21-24).

8. Plaintiff filed exceptions (90 pages), supplemented by numerous exhibits (47 pages).

9. On March 6, 1981, Judge Sarokin ordered:

Order

"1. The Report and Recommendation of Magistrate Perretti filed December 31, 1980 be and the same hereby is adopted as the Opinion of this court.

2. For the reasons stated therein, the complaint in the above matter is DISMISSED, with prejudice and without costs."

10. On March 23, plaintiff moved for reconsideration, to set aside the foregoing Order. Defendants cross moved for reconsideration, to amend the Order to provide injunctive relief against instituting further suits in the Federal Court with respect to the 1974 recapitalization.

11. On April 1, plaintiff filed a second motion for reconsideration, to set aside the March 6th Order, and to transfer this JURY TRIAL to the Southern District of New York "if your Honor cannot have this JURY TRIAL tried in this New Jersey Court."

12. On April 6, Judge Sarokin sent the following letter to the parties:

"Plaintiff Gabriel has moved for reconsideration of the dismissal of the above-entitled matter dated March 9, 1981. Having read all of the papers submitted on behalf of all the parties in this matter, the court finds no new issues or law which would mandate reconsideration. Plaintiff's motion for reconsideration is, therefore, denied.

Defendant has requested that the court enter an injunction against the plaintiff, enjoining him from

instituting any suit in the federal court against any of the defendants or any other corporate officers or agents regarding any matter alleged in the complaint in the above-entitled matter which deals with the 1974 recapitalization. Authority for such an injunction may be found in *Montana v. United States,* 440 U.S. 147, 153-4 (1979).

Injunctive relief is a proper remedy under the circumstances of this action. Actions that are repetitious or that are intended to harass, as is the case here, must be enjoined. The plaintiff Gabriel is, therefore, enjoined from further litigation based upon the facts alleged in *Gabriel v. Missouri Pacific Railroad,* Civil No. 78-1476 in this or any other federal court against any of the defendants or other corporate officers or agents. The defendant will submit an appropriate order."

13. On April 7, Judge Sarokin signed the Order which is the subject of the instant motion for reconsideration. That Order reads:

"1. The Report and Recommendation of Magistrate Perretti filed December 31, 1980 be and the same hereby is adopted as the Opinion of this Court.

2. For the reasons stated therein:

a. The complaint in the above matter is DISMISSED, with prejudice and without costs;

b. Plaintiff is permanently enjoined from instituting any suit in the Federal Court against any of these defendants or any other corporate

officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization."

14. On April 10, plaintiff filed a third motion for reconsideration, to set aside the March 6th Order. On April 20, Judge Sarokin wrote to the parties:

> "For the reasons heretofore expressed and there being no additional facts or law presented, plaintiff's motion for reconsideration is denied."

15. On April 18, plaintiff filed his first motion for reconsideration to set aside the April 7th Order (33 pages).

16. On May 11, Judge Sarokin wrote to plaintiff, with the original to the Clerk and copy to defendants' attorneys, as follows:

> "I have reviewed your motion for reconsideration and reargument and said motion is denied. You are directed to file no further motions for reconsideration or reargument in this matter. You may pursue an appeal if you deem it appropriate. Thank you."

17. On May 19, plaintiff filed a second motion for reconsideration, to set aside the April 7th Order. This was couched in the form of a motion to set aside the May 11th Order, denying his motion for reconsideration and reargument of his complaint (31 pages).

18. On June 5, plaintiff filed a third motion for reconsideration, to set aside the April 7th Order. This was couched

in the form of a motion to set aside the May 11th Order, which had denied his motion for reconsideration and reargument of the April 7th Order (15 pages).

19. On June 9, Judge Sarokin signed an Order in the form of a letter to the parties. This reads:

> "The court has reviewed plaintiff's further motion for reconsideration, and said motion is denied. Plaintiff is ordered and directed not to file any further motions for reconsideration and reargument in this matter. If plaintiff violates the order of the court in this regard, the court will entertain an appropriate motion for counsel fees or other sanctions."

20. On June 23, plaintiff filed a fourth motion for reconsideration, to set aside the April 7th Order. This was couched in the form of a motion to set aside the June 9th Order, which denied reconsideration and reargument of the April 7th Order (21 pages). The caption reads in part:

> "THE HON. SAROKIN COURT HAS NO CONSTITUTIONAL RIGHT TO DEPRIVE ME OF MY JURY TRIAL CASE, THE COURT ACTING ON ITS OWN WITHOUT A JURY OF MY PEERS TO OVERSEE THE HON. SAROKIN COURT'S ACTION. *THEREFORE I AM HOLDING THE HON. SAROKIN COURT LIABLE FOR SUM OF $35,000,000 DAMAGES THAT A JURY WOULD HAVE BEEN INSTRUMENTAL IN HELPING PLAINTIFF GET FROM DEFENDANTS BY DIRECTING THE I.C.C. TO EVALUATE PLAINTIFF'S*

MOPAC CLASS B SHARES UNDER DUE PROCESS OF LAW UNDER A SECTION 19a (49 U.S.C. Sect. 19a) PROCEEDINGS, ***WHICH THE MISSOURI PACIFIC RAILROAD CO. WOULD HAVE HONORED WITH NEW RAILROAD STOCKS.***

21. At the oral argument on the morning of July 13, the Court made the following rulings:

> "I've gone over the materials you submitted. I see no basis at all for granting your motion for reconsideration and, accordingly, your motion for reconsideration is denied *** Let me tell you that as well, that when this order is prepared we will put a stop to this. The clerk is directed not to take any more papers from you in this matter. And I will tell you this, that I want this order prepared to that effect. And this is not a threat but, on the other hand, I do have to counsel you this, that I don't have my orders flaunted lightly, and if I have to impose sanctions, I will."
>
> * * *
>
> "With respect to any case in which you would have a jury trial, if on the papers you don't have a basis in law for going to the jury, you don't go to the jury. That's the first point. Secondly, you complain about the magistrate having prepared a report and recommendation. That's pursuant to statute."

22. On the afternoon of July 13, plaintiff submitted a paper stating:

Order

> "Plaintiff pro se has been obeying and following Rule 12-I . . . The Hon. Frederick B. Lacey Court cannot punish me for following Rule 12-I. I have a right to follow Rule 12-I. That is my Constitutional right. I have a constitutional right to protect my property according to the 5th and 14th Amendments of the United States Constitution."

23. The same document contains a notice to the Clerk, quoting Rule 12-I, and concluding "According to Rule 12-I of the above Rules, I have a right to file a motion for reargument within 14 days after the filing of the Court's Order. I have a right to do this."

24. On July 15, plaintiff submitted a paper repeating the language of Rule 12-I, and repeating the foregoing arguments.

25. Plaintiff was a party of record in the Interstate Commerce proceeding which his complaint seeks to enjoin (Report, pp. 8-9). Since the filing of the complaint, on September 25, 1978, the Commission approved the Recapitalization Plan, and denied rehearing on March 8, 1979 (Report, p. 11). "Although plaintiff dropped out of the ICC proceedings, his brother, Napoleon, remained as a party of record and continued to flog the same issues in his petition for administrative review." (Report, p. 21). This petition was filed in the Court of Appeals for the District of Columbia, where Napoleon Gabriel was acting *pro se*.

26. On March 6, 1981, the Court of Appeals entered an Order assigning the cause to a panel, and dispensing with oral argument. This Order was signed by the Clerk by direction of the Court.

Order

27. On March 25, 1981, the Court of Appeals rendered a judgment from which the following is quoted:

> "Petitioners have engaged for several years in a quest to receive more for their Class B stock than they were allotted in the 1974 recapitalization of Missouri Pacific Railroad Company. They have presented and re-presented their claim in several contexts and forums. We have reviewed the ponderous papers filed by the parties and the prior adjudications in point. Based on this review, we find the Commission's conclusion irresistible.
>
> The matters petitioners would raise yet again have been carefully considered and rationally determined by several courts and by the Commission itself in earlier proceedings. No new issue of substance appears in the briefs before us. While we do not on this occasion enter a coercive order against petitioners, *cf. James C. Gabriel v. Missouri Pacific Railroad,* Civil No. 78-1476 (D.N.J. March 6, 1981) (adopting December 31, 1980 Magistrate's Report and Recommendation), we cannot conceive a case more appropriately subject to the law of res judicata. 'Finality . . . is the service rendered by the courts through the operation of the law of res judicata.' Restatement (Second) of Judgments, Introduction at 13 (Tent. Draft No. 7, 1980). By this order we perform that service.
>
> On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of

the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed.

Per Curiam

For the Court

George A. Fisher, Clerk"

28. On April 2, the Court of Appeals made an Order denying the motion of petitioners to be permitted to file additional evidence to correct the record.

29. On April 24, the Court of Appeals filed the following Order:

"Petitioners' suggestions for rehearing *en banc* in each of these consolidated cases have been circulated to the full Court and no judge of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court, *en banc* that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk"

30. On June 2, he Court of Appeals filed the following Order:

Order

"The motion of appellant [Napoleon] Gabriel for reconsideration of the Court's order of April 24, 1981 denying the petition for rehearing *en banc* has been circulated to the full Court. The Court is of the unanimous opinion that the motion for reconsideration is not an authorized nor proper submission and it is therefore,

ORDERED by the Court *en banc* that the Clerk is directed to return the motion for reconsideration unfiled.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk"

31. On June 15, petitioner Napoleon Gabriel submitted to the Court of Appeals a motion for reconsideration of the June 2 Order, on the following ground:

"THERE WERE NO PERSONAL SIGNATURES AFFIXED BY THE COURT'S JUDGES ON ORDERS, DECISION AND JUDGMENT ON THIS CASE, MAKING THEM NOT LEGAL-NUL AND VOID. DUE PROCESS EVALUATION ARE RIGHTS SECURED TO PETITIONER BY U.S. CONSTITUTION. I EXPECT HON. JUDGES TO LIVE UP TO THEIR OATH OF OFFICE."

30. On June 29, petitioner Napoleon Gabriel submitted to the Court of Appeals a second motion for reconsideration of the June Order on the ground that the Clerk had no right to sign

the Order of March 6th dispensing with oral argument. The Motion continued:

> "Because of the above reasons, and other reasons too numerous to mention, the above captioned cases have not been terminated, but they are still alive in this Court. I am holding the Clerk of this Court personally responsible for $25,000,000 MoPac Class B values."

33. The two foregoing motions of petitioner Napoleon Gabriel, while stamped "Received" according to the usual practice of the Clerk's Office, were neither docketed nor submitted to the Court.

CONCLUSIONS OF LAW

1. Rule 12(I) authorizes a single motion for reargument; it does not permit more than one.

2. This Rule cannot be circumvented by plaintiff's procedure of moving to reconsider an Order, and upon denial of that motion, moving to reconsider the Order of Denial.

3. Plaintiff's motion of June 15, 1981, repeated on June 23, 1981, being the fourth motion to reconsider Judge Sarokin's Order of Dismissal April 7, 1981, should be dismissed as not authorized by the Rules.

4. If plaintiff's foregoing motions were subject to consideration on the merits they would have to be denied, inasmuch as they do not set forth any relevant matters or controlling decisions which the Court has overlooked.

Order

5. The actions of plaintiff and of his brother described in the Findings of Fact and in the Report, establish the strong probability that plaintiff may continue to bombard this Court and defendants with additional repetitive papers. The Court has jurisdiction to direct the Clerk to refuse to accept, docket or submit to the Court any further papers in this action, except for a Notice of Appeal.

6. The above described actions of plaintiff and his brother establish the strong probability that plaintiff may institute suit for substantial damages against Judge Sarokin, and against the Clerk and his subordinates. The Court has jurisdiction to enjoin such frivolous and vexacious litigation, intended to harass those persons in the performance of their official duties, and using the courts as a stage for plaintiff's vendetta of harassment and abuse, with the result of burdening the heavy case loads of the courts and obstructing the application of justice in more meritorious cases (see Report, pp. 22-23).

It is therefore, on the 22 day of July, 1981

ORDERED:

1. Plaintiff's motions to reconsider Judge Sarokin's Order of April 7, 1981 are dismissed.

2. Plaintiff's motions to reconsider Judge Sarokin's Order of April 7, 1981 are denied on the merits.

3. The Clerk of this Court is directed not to accept, nor to docket, nor to submit to the Court any further papers in this case, except for Notice of Appeal.

Order

4. Plaintiff is permanently enjoined from instituting suit in any court against Judge Sarokin, the Clerk of this Court, or any of his subordinates, in respect of any matters involved in this action.

s/ Frederick B. Lacey
Frederick B. Lacey
United States District Court Judge

All of the foregoing is based upon the determination of the Court as set forth in the hearing of the oral argument on July 13, 1981.

s/ Frederick B. Lacey
Frederick B. Lacey
United States District Court Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 7, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 78-1476

JAMES C. GABRIEL,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, et al.,

Defendants.

It is on this 7 day of April 1981, ORDERED:

1. The Report and Recommendation of Magistrate Perretti filed December 31, 1980 be and the same hereby is adopted as the Opinion of this Court.

2. For the reasons stated therein:

a. The complaint in the above matter is DISMISSED, with prejudice and without costs;

b. Plaintiff is permanently enjoined from instituting any suit in the Federal Court against any of these defendants or any

other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

s/ H. Lee Sarokin
H. LEE SAROKIN
United States District Judge

FILED
Apr. 7, 1981
Angelo W. Locasio

REPORT AND RECOMMENDATION OF MAGISTRATE PERRETTI DATED DECEMBER 30, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 78-1476
Hon. H. Lee Sarokin

JAMES C. GABRIEL,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M. M. HENELLY, JOHN H. LLOYD, D. B. JENKS AND THOMAS H. O'LEARY

Defendants.

According to the complaint in this action, the plaintiff is a stockholder in the Missouri Pacific Railroad Company, which will be called MoPac. MoPac's application to the Interstate Commerce Commission for approval of a plan of merger and an exchange of stock has been approved by that agency and the plaintiff disagrees with the order of the Commission.

Named as defendants in this case are MoPac, the Missouri Pacific Corporation, a Delaware holding company, and two officers of each of those corporations.

Plaintiff claims that jurisdiction is based on diversity of citizenship, the amount in controversy exceeding $10,000.00. Plaintiff is a citizen of the state of New Jersey. Defendant MoPac

is a corporation of the state of Missouri with its principal place of business in that state and defendant Missouri Pacific Corporation is a Delaware corporation having its principal place of business in Missouri. The individual defendants are said to be citizens of the state of Missouri as well.

At the time of the filing of the complaint MoPac's application to the ICC had not yet been ruled upon by the Commission but its application was pending. Plaintiff demanded that this court enjoin the defendants from processing any further steps before the ICC in consummation of the merger and recapitalization of MoPac which had been voted upon by that corporation's stockholders. In addition, the plaintiff demanded declaratory relief on four issues, (1) declaring that the B stock (allegedly owned by plaintiff) was entitled to vote as a class, (2) fixing the valuation of the B shares according to a formula contained in a certain agreed systems plan, (3) interpreting a certain opinion of the United States Supreme Court as being controlling in the instant matter and (4) declaring that the Interstate Commerce Commission Act may not be used to defraud the holders of class B stock in MoPac.

During the pendency of this action the Interstate Commerce Commission has ruled on MoPac's application and has approved it and the Commission's order is now on appeal before the Court of Appeals in the District of Columbia pursuant to 28 U.S.C. §2321. A letter memorandum from plaintiff dated December 13, 1980, ignores the fact that the ICC proceedings have already been terminated. This lapse is symptomatic of the problems posed by plaintiff's entire case. It is apparent that plaintiff does not accept the occurrences of the past 25 years which have related to the interest which he holds in the Missouri Pacific Railroad Co. Plaintiff attacks the merger plan almost entirely on the basis of a misinterpretation of past events which will be elaborated upon in this report. The plaintiff does allege, however, with specific

application to the plan of merger, that the exchange of stock would not reflect the real value of the MoPac shares. Plaintiff further alleges in a most conclusory manner that the ICC makes its decisions strictly on the basis of the applications made by the carriers without considering the testimony and briefs of objecting stockholders. In support of this position the plaintiff attaches to his complaint an extract from a book entitled, *The Superlawyers,* by Joseph C. Gulden.

Defendants have moved pursuant to Rule 12(b) Fed. R. Civ. P. to dismiss for lack of subject matter jurisdiction, for lack of jurisdiction of the person of the individual defendants and Missouri Pacific Corporation and on the ground that the plaintiff's claims are barred by *res judicata.* Defendant also seeks to enjoin plaintiff permanently from instituting proceedings against defendants on the facts alleged in the complaint on the ground that any such proceedings would be vexatious. The parties having presented matters outside the pleadings, the motions are treated as for summary judgment. The original motion was filed on August 25, 1978 and the plaintiff has continued to present material until December of 1980. Plaintiff has been afforded a reasonable opportunity to present his position and no further material in connection with the motion will be received.

Although the complaint has 33 pages, the plaintiff's allegations may be briefly summarized. Plaintiff claims that the Missouri Pacific Railroad Company was reorganized after bankruptcy and its reorganization was approved by the Interstate Commerce Commission on July 29, 1954 in an order at 290 ICC 477. He calls the reorganization the "Agreed System Plan". Under the agreed system plan two classes of stock were set up. A non-cumulative preferred class A with voting rights and a class B, common stock, with very limited voting rights. Plaintiff calls the class B Shares "Equity Bearing MoPac Common". He says,

correctly, that under the agreed system plan a majority vote of each class was required for approval of any plan of recapitalization. The complaint further alleges that the principal stockholder of MoPac class A was the Mississippi River Fuel Corporation. In 1966 Mississippi River Fuel voted its A shares to merge MoPac with the Texas and Pacific Railway and to issue a single class of shares of new stock in the merged railway. The complaint points out that this effort resulted in the case of *Levin v. Mississippi River Fuel Corp.* 386 U.S. 162 (1967), in which the Supreme Court held that the plan of merger could not be effectuated without the approval of each class of stock as was required by MoPac's Articles of Association and the laws of the state of Missouri (thereafter the MoPac-Texas Pacific merger was abandoned by the two railroads).

The Mississippi River Fuel Corporation changed its name to Mississippi River Corporation and continued as the owner of the majority of the outstanding Class A stock of MoPac. The majority holder of the B stock was the Allegheny Corporation. Plaintiff alleges that Allegheny was a motor carrier under the jurisdiction of the Interstate Commerce Commission which had ordered it to divest itself of its class B shares in the rail carrier MoPac. The complaint indicates that Allegheny's class B MoPac shares were actually controlled by the ICC. However, a copy of an ICC report furnished by plaintiff, Allegheny/Jones Motor Co., 109 MCC 333, indicates that Allegheny's MoPac shares were held under a trusteeship which had been previously ordered by the commission.

According to the complaint, a class action was certified on October 9, 1968 by Hon. F. P. Bryan in the Southern District of New York. The suit alleged that the class B dividends were too low and that the directors of MoPac were favoring the class A stockholders to the benefit of Mississippi River Corporation.

Allegheny Company was a class representative. The suit resulted in a settlement which the plaintiff did not approve. The complaint alleges "It is unconstitutional, against due process, to hold dissenters in a Class Action". The complaint further alleges that the settlement was contrary to agreed system plan. According to the complaint, the settlement involved an agreement between Allegheny and MoPac for the transfer of the Allegheny class B shares to the Mississippi River Corporation at an agreed value. The settlement agreement was put to a vote of the stockholders voting by classes. The plaintiff complains that the proxy statement did not reveal that Allegheny had important financial reasons for wishing to dispose of its class B common shares, that is to say, the Jones Motor Company matter was not explained in the proxy statement. Plaintiff cast his class B shares against the plan but the majority of both classes voted for a recapitalization which involved a conversion of the class A preferred into a new MoPac common and the elimination of class voting. The recapitalization was also the subject of an application for approval by the ICC which was granted in December, 1973. Omitted from the complaint is all reference to the case of *Gabriel v. United States,* 416 Fed. Supp. 810 (D.N.J. 1976), an appeal to a three judge court to set aside and annul the order of the ICC which approved the recapitalization and authorized the issuance of the securities in accordance with the plan. *Gabriel v. United States* will be discussed in connection with a review of the defendants' position in this matter.

The allegations of the complaint skip to events which occurred in 1977. Mississippi River Corporation had changed its name to Missouri Pacific Corp. which is said to be a Delaware holding company owning 92.3% of the shares of MoPac. The old Allegheny class B shares had been exchanged for MoPac common under the 1973 recapitalization plan and had been sold to Missouri

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Pacific Corp. in accordance with the settlement worked out in *Levin v. Mississippi River Corporation,* the class action. The plaintiff had not surrendered his class B shares and makes the following allegation in his complaint:

> The fact of the matter is that Class B as of today controls the MoPac veto according to the U.S. Supreme Court Decision: Levin v. Miss, 386 US 162, 170 (1967) a "Plan" may not be adopted without the consent of at least a majority of CLASS B.
>
> Plaintiff CLASS B MoPac stockholder has been and is presently being severely damaged by Defendants who are working in concert to take away his Class B values and transfer them to MPC to enrich themselves . . . .

According to the complaint, MoPac and Missouri Pacific Corporation proposed in 1977 to merge MoPac into Missouri Pacific Corporation. Each share of MoPac common which was issued in the 1973 recapitalization would be exchanged for .95 share of Missouri Pacific Corporation stock. Plaintiff alleges that this plan is unfair in that it undervalues the class B shares which he holds. In addition, he alleges that the holding company which has power to elect the MoPac board of directors "is using that power to the detriment of all the MoPac shares, including the Class B MoPac Common shares. MPC is misusing [the ICC proceeding] to try to take over all remaining MoPac shares." Plaintiff charges that Missouri Pacific Corp. will receive "enormous financial benefits" from the merger the purpose of which is a "conspiracy to defraud the Class B equity bearing MoPac Common stockholders."

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According to the complaint the plaintiff attended a special meeting of the stockholders of MoPac held on December 9, 1977 for the purpose of voting on the plan of merger. The complaint states that there remain 1,015 shares of class B which had not been exchanged. Plaintiff voted 76% of these shares against the proposal. He alleges that this constitutes a veto of the plan since "The law requires the assent of the majority of the MoPac shareholders on a separate Class vote basis".

Defendants, according to the complaint, are "pretending Class B MoPac equity bearing Common shares which are the residuary beneficiaries of the Missouri Pacific RR properties don't exist . . . .". The plaintiff's purported veto, having been disregarded by the defendants, an application was made to the ICC on December 20, 1977 for approval of the plan of merger and the issuance of new stock in exchange for the MoPac shares. Plaintiff contends that the exchange ratio is unfair as to him because it undervalues his class B stock. He argues that this is so because the 1973 recapitalization in its turn undervalued the class B stock. The complaint goes on to say that the class B stock must be evaluated "at their real true value" based on an appraisal of the assets of MoPac including its land holdings and its mineral rights. In this connection the plaintiff alleges that the defendants are attempting to conceal the fact that the corporation is the owner of extensive land which was granted to it in the 1800's.

In order to forestall action by the ICC on the defendants' application, action which plaintiff believes would be favorable to MoPac, his complaint seeks to enjoin the defendants from taking further steps to obtain approval of the plan. As has been seen, the plaintiff also seeks declaratory judgment.

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SUBJECT MATTER JURISDICTION

Plaintiff claims that the jurisdiction of this court is based on diversity of citizenship and his prayer is for relief against the named defendants. The effect of the relief sought, if granted, would be to enjoin a proceeding pending before the ICC and to give a court's adjudication of matters pending before that commission. The circumstances which existed when plaintiff filed his complaint are established by the exhibits offered by defendants in support of their motion. A decision of the Interstate Commerce Commission dated May 9, 1978 in connection with the Missouri Pacific Railroad Company merger, ordered that the proceeding would be handled under a modified procedure which set up a time-table for the filing of written submissions and the determination of the matter on the papers submitted. Plaintiff, James C. Gabriel, was a party of record in that proceeding. The decision of May 12, 1978 contains the following:

> Certain of the commentators allege that the proposed merger and consolidation will diminish the value of their Class B common shares of Missouri Pacific Railroad Company, a Missouri corporation (MoPac), and that the plan is for various other reasons contrary to the public interest. The primary contention relates to questions exhaustively examined in prior proceedings. In 1973, the United States District Court for the Southern District of New York approved a settlement agreement in an action originally directed at MoPac's dividend policy with respect to the Class B stock. *Levin v. Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y.), *aff'd mem. sub nom. Wesson v. Mississippi River Corporation,* 486 F.2d 1398 (2d Cir), *cert denied,*

414 U.S. 1112 (1973), *reh. denied,* 415 U.S. 939 (1974). The railroad then sought Commission authority to issue certain new types of stock to effectuate the settlement agreement and the recapitalization plan which it encompassed. The Commission determined, and the reviewing courts agreed, that the offer of exchange for Class B stock represented the fair value of those securities, and that the plan was reasonable to all parties and in the public interest. *Missouri Pac.R. Co., Securities,* 347 I.C.C. 377, 411, 417 (1973), *aff'd sub non. Gabriel v. United States,* 416 F. Supp. 810 (D. N.J.) *aff'd,* 429 U.S. 1011 (1976), *reh. denied,* 429 U.S. 1124 (1977); *Commission decision also aff'd sub nom. Labelle Gillespie v. United States,* Civil Action No. 74-239-C(2) (E.D. Mo. 1974). Unwilling to accept the finality of those determinations, the noted commentators have never exchanged their old Class B shares for the presently-outstanding MoPac Common Stock, and would now have us reconsider the recapitalization proceedings. The Commission and the courts have fully reviewed and approved the recapitalization, however, and the matter is now *res judicata.* We cannot permit the holders of unexchanged Class B stock to use the occasion of our review of the instant proposals as a vehicle for re-examination of issues finally determined in previous proceedings, and we will not entertain arguments directed at the fairness or propriety of the prior recapitalization.

It must be concluded that the plaintiff filed this action as a direct response to the Commission's decision of May 12, 1978.

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No matter how it is designated in the complaint, the action is nothing other than an attempt to appeal the May 12, 1978 ruling of the Commission. It is obvious that the ruling was not a final order of the Commission. Apparently plaintiff determined not to go forward before the Commission on the Commission's terms.

It is settled law that a court cannot enjoin administrative action until administrative remedies have been exhausted. *Meyers v. Bethlehem Corp.*, 303 U.S. 41 (1938).

In *Meyers*, the district court, enjoined the National Labor Relations Board from holding a hearing on a complaint of unfair labor practices at Bethlehem's Fore River Plant. Bethlehem's contention was that the plant's operations did not involve interstate or foreign commerce; and therefore that the hearings would be futile, and their holding would cause bad labor relations, impaired efficiency, and substantial expenses. (327 U.S. at 47-8).

In reversing the court said, per Brandeis, J. (327 U.S. at 50-1):

> The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.
>
> Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of

> the prescribed administrative hearing would result in irreparable damage. (fns. omitted).

"If it be the policy of the law that the Labor Board cannot be enjoined from conducting a hearing on the complaint made, it would not seem proper that this policy could be nullified and evaded by permitting an injunction prohibiting the defendants from originating the complaint which would be the subject of hearing by the Labor Board." *Burlington Mills Corp. v. Textile Workers Union,* 44 F. Supp. 699, 702 (W.D. Va. 1941). See to the same effect *Capital Transit Co. v. Safeway Trails,* 201 F.2d 708 (D.C. Cir. 1953).

There is no doubt that the Interstate Commerce Commission has exclusive jurisdiction over the applications presented to it by MoPac. *Schwabacher v. United States,* 334 U.S. 182 (1948). Upon a final ruling by the Commission, a party aggrieved may obtain judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. §702 in the Court of Appeals, 28 U.S.C. §2321.

Since the filing of the complaint in this court, the ICC has issued its final order on the application. The ICC decision is dated September 25, 1978 and the petitions for administrative review by the Commission were denied on March 8, 1979. One of the petitioners for review was plaintiff's brother, Napoleon C. Gabriel. Napoleon's assault upon the Commission's decision was based upon the argument that class B stockholders were not bound by the 1974 recapitalization of MoPac. Napoleon demanded that his class B common stock be evaluated according to the terms of the 1956 agreed systems plan. It can be seen that his position before the ICC is identical to that taken by his brother, the plaintiff in this matter.

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Because of the passage of time, the facts to which the plaintiff addresses himself have changed. While he originally sought to enjoin defendants from processing their application before the ICC, that application has now been approved. The plaintiff's prayers for declaratory relief are now directed at a final order of the Commission. The declaratory relief, if granted, would reverse not only the Commission's decision of May 12, 1978, but also the final decision of September 25, 1978 and the denial of petition for administrative review dated March 8, 1979. Judicial review of the Commission's orders is provided for in 28 U.S.C. §2321 which reads, in pertinent part, as follows:

> Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the Court of Appeals as provided by and in the manner prescribed in Chapter 158 of this title.

The jurisdiction of the court of appeals to review actions of the Interstate Commerce Commission is established by 28 U.S.C. §2352, the relevant portions of which read as follows:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of - . . .
> All rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by § 2321 of this title . . . . Jurisdiction is invoked by filing a petition as provided by Section 2344 of this title.

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28 U.S.C. §2344 provides that the action for review shall be against the United States. 28 U.S.C. §2322 also provides that "All actions specified in § 2321 of this title shall be brought by or against the United States". The relief which plaintiff seeks and the application for merger which was pending before the Interstate Commerce Commission do not involve in any way any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties and forfeitures. Thus, 28 U.S.C. §1336(A) and 28 U.S.C. §1398 are inapplicable.

One of the primary objectives of the Congress in providing for judicial review of Interstate Commerce Commission orders by the court of appeals was to prevent a multiplicity of suits relating to the same subject matter. H.R. REP. NO. 93-1569, 93d Cong. 2d Sess. *reprinted* in [1974] U.S. CODE CONG. & AD. NEWS 7025. To permit this plaintiff to disregard the statutory method of securing review of the Commission's orders by invoking this court's jurisdiction under the guise of a diversity case would vitiate the congressional plan and objective. Entertaining the suit under diversity jurisdiction would encourage the bringing of multiple suits challenging a single ICC order in different locations before different courts. This would totally defeat the congressional intent "to vest exclusive jurisdiction in the court of appeals in which the agency record is first filed . . ." *Id.* at 7033.

A district court has no subject matter jurisdiction in this case because "exclusive jurisdiction over this action is vested in the court of appeals pursuant to 28 U.S.C. §§2321 and 2342." *Chemical Leaman Tank Lines, Inc. v. U.S.*, 446 F. Supp. 721, 724 (D. Del. 1978), "orders other than those involving monetary matters are of course now subject to review only by the Courts of Appeals under [28 U.S.C. §2321]", *Quaker State Oil Refining Corp. v. U.S.*, 465 F. Supp. 75, 76 (W.D. Pa., 1979).

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State of Minn., by Spannaus v. O'Neal, 472 F. Supp. 905 (D. Minn. 1979), involves an attempt to bypass the provisions of 28 U.S.C. §2321 and §2342 by invoking the jurisdiction of the district court under the guise of a petition for mandamus. In the *Spannaus* case there were pending before the ICC, applications by various railroad companies to abandon certain lines within the state of Minnesota. The ICC made an environmental evaluation of each proposed abandonment and concluded that inasmuch as the abandonments did not constitute major federal actions significantly affecting the quality of the human environment, no environmental impact statement would be required. The Commission had not issued a decision on the merits in any of the abandonment proceedings when plaintiff petitioned for the writ. The court relied on *Meyers v. Bethlehem Shipbuilding Corp., supra,* in holding: "Judicial review of administrative agency decisions must be postponed until available administrative remedies have been exhausted." 472 F. Supp. at 907. The court concluded as follows at 472 F. Supp. at 908:

> In any event, even if judicial review were available at this time, exclusive jurisdiction would lie in the court of appeals, not this court, 28 U.S.C. §§2321, 2342. Where exclusive jurisdiction is mandated by statute, as it is here, plaintiff cannot by-pass the procedure which Congress has provided by labeling its requested relief "mandamus." *North American Van Lines v. Interstate Commerce Commission,* 386 F. Supp. 665, 681 (N.D. Ind. 1974). Where a statute specifically provides for exclusive jurisdiction in one court, as 28 U.S.C. §2342 does, this specific grant of jurisdiction takes precedence over a general grant of jurisdiction, *ITT v. Vencap, Ltd.,* 519 F.2d 1001 (2d Cir. 1975);

Report and Recommendation

Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968).

An identical view of the law is stated in *B.F. Goodrich Company v. Northwest Industries, Inc.*, 424 F.2d 1349 (3rd Cir. 1970), a case which arose under the since-repealed three judge court method of review of ICC orders. Goodrich sought in effect to enforce section 5(2) of the Interstate Commerce Act (now 49 U.S.C. §11343), by an action in the district court requesting an injunction restraining Industries from acquiring Goodrich stock without first obtaining Commission approval. Goodrich had sought the same relief by intervening in a merger proceeding before the Commission, in which Industries was a party. The Commission had denied the relief sought by Goodrich.

It was held at 424 F.2d at 1352-4:

> We agree that the District Court had no jurisdiction over the Goodrich complaint. The complaint was in substance a collateral attack on an order of the Commission and an attack on such an order may be brought only before a three judge court . . . . *Venner v. Michigan Central Railroad Co.*, 271 U.S. 127.
>
> The statutory procedure for review is applicable although an order is not directly attacked—so long as the practical effect of a successful suit would contradict or countermand a Commission order. *Venner v. Michigan Central Railroad, supra.*

The above language is directly applicable to plaintiff's complaint. Since the complaint was filed, the Commission has

entered an order authorizing elimination of the interest in Missouri Pacific Railroad Company of the minority shareholders (including this plaintiff).

It is respectfully recommended that the complaint be dismissed for lack of subject matter jurisdiction.

THE VEXATIOUS NATURE OF THE COMPLAINT

The issues raised in the complaint, the demand for relief and the arguments of the plaintiff in support of his position have been summarized in the discussion of the contents of plaintiff's complaint. Plaintiff has presented the identical matters to a variety of forums over the course of the years. None of the forums have been receptive to the plaintiff's claims and the repetitive and vexatious nature of his claims have been called to his attention on past occasions. He, however, persists in pursuing issues which have been repeatedly decided against him.

The issues presented by the plaintiff in this case were first dealt with and disposed of in *Levin v. Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973), *Aff'd. sub nom Wesson v. Mississippi River Corporation,* 486 F.2d 1398 (2nd Cir 1973) *cert. denied, sub nom Wesson v. Levin,* 414 U.S. 1112 1973, *rehearing denied,* 415 U.S. 937 (1974). Under MoPac's 1956 reorganization plan, the Class A stockholders had voting control while the Class B stockholders had the residual equity and a veto power over mergers, consolidations and reorganizations. "In practical terms, the 'ingenious' solution envisioned under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock." 59 F.R.D. at 358. The situation led to the *Levin* case which was certified as a class action by Hon. Frederick P. Bryan. The class was certified within

the provisions of Rule 23(a)(b)(1) and (2) Fed. R. Civ. P. and the members of the class were all Class B stockholders. A copy of the order has been submitted in support of this motion. According to the plaintiff's complaint he opted out of the class action. However the privilege of being excluded from the judgment only exists in actions brought under Rule 23(b)(3), Wright and Miller, Federal Practice and Procedure: Civil §1787.

The *Levin* case was vigorously and exhaustively litigated. A chronology of the proceedings in that case will demonstrate the plaintiff's persistence in the face of warnings from the courts. A final judgment approving the settlement was entered May 2, 1973. The judgment was affirmed by the Second Circuit Court of Appeals and within the same year the United States Supreme Court denied certiorari. While the matter was on appeal, a motion was made to the District Court to set aside the judgment. The motion raised the Allegheny/Jones matter. It was denied on December 5, 1973, the district court holding that the subject had been considered in the original hearing to approve the judgment. In early 1974 the Supreme Court denied a rehearing of its denial of certification.

After the denial of the rehearing by the Supreme Court there was a motion to vacate the final judgment. This motion attacked the class certification. It was denied on April 8, 1974. The denial was affirmed by the Second Circuit on December 18, 1974. Certification was denied in 421 U.S. 915 (1975). A rehearing was denied, 421 U.S. 1006 (1975) and a second petition for rehearing was rejected by the Clerk of the Supreme Court. While this was going on, plaintiff moved in the district court to set aside the judgment and the motion was denied on March 21, 1975. The denial was affirmed by the Second Circuit November 18, 1975, which contains the following warning to plaintiff: "Although at this time we will not act pursuant to appellees' suggestion that

costs be imposed upon Gabriel under FRAP 38, further appeals of this nature in a matter already so thoroughly litigated may justify the imposition of such a sanction."

Even while the appeal to the circuit was pending, plaintiff made a second motion to the district court to set aside the judgment which was denied June 3, 1975. The opinion states, "Petitioner Gabriel's motion to re-open is hereby denied. Court finds motion vexatious and orders movant to pay $100.00 counsel fees . . . ."

Plaintiff returned to the court of appeals and requested an extension of time to file a petition for a rehearing *en banc* of the circuit's affirmance on November 18, 1975 of the denial of plaintiff's motion to set aside the judgment. The motion for extention of time was denied on December 16, 1975. Plaintiff's motion to reconsider the motion to extend the time was denied on January 7, 1976. Plaintiff's motion to reconsider the motion to reconsider the motion to extend the time was denied on February 2, 1976. The order stated, "this court will not consider any further motions for reconsideration in this appeal."

While thus engaged in the *Levin* case, plaintiff was also busy elsewhere. MoPac, having settled the *Levin* case, proceeded in accordance with the settlement agreement to file its application with the Interstate Commerce Commission for authority to issue shares which would enable it to effectuate the plan of recapitalization which was the heart of the settlement agreement. Plaintiff appeared in that proceeding as a party of record. The report of the Commission dated December 6, 1973, 347 ICC 377 reveals that the Commission considered the reasonableness of the plan of recapitalization as it applied to the Class B stock. Expert testimony was presented in support of the plan and ten Class B shareholders including this plaintiff offered testimony to the contrary. The issues presented by the objectors included their

demand that the value of the B shares be measured by book value in accordance with their view of the requirements of the 1954 reorganization plan. The Class B objectors presented the argument that the class action in the Southern District was illegal and that the class voting rights which were established in the 1954 reorganization plan were immutable. The objectors argued that the vote of the MoPac stockholders which adopted the plan of recapitalization was invalid because of misrepresentations in the proxy statement. The alleged misrepresentations relate to the Allegheny/Jones matter. The objectors also alleged ill-defined improper conduct by the directors and generalized conspiracy and fraud. The Commission found all of the objectors' contentions to be without merit. The Commission ruled that the 1954 reorganization was not an "immutable contract for all time" and pointed out that the 1954 reorganization plan itself recognized the possibility of a change in the relationship between the two classes of stock.

Plaintiff moved for reconsideration which was denied. The motion for reconsideration was based upon plaintiff's argument that the *Levin* case was an illegal proceeding. Plaintiff's next petition which sought a finding that an issue of general transportation importance was involved was denied in March, 1974.

Seeking review of the action of the Interstate Commerce Commission, plaintiff commenced suit in this district in the case entitled *Gabriel v. United States,* Civil No. 74-471, filed April 3, 1974. After a multiplicity of motions in which plaintiff sought unsuccessfully to compel the joinder of the Internal Revenue Service as a party plaintiff, the case was decided in an opinion by Hon. Clarkson S. Fisher, writing for a three judge court, on April 20, 1976. *Gabriel v. United States,* 416 F. Supp. 810 (D.N.J. 1976). The opinion succinctly lists the issues decided and they are identical

to those dealt with by the Interstate Commerce Commission. Interestingly enough, while plaintiff's suit against the United States was pending here in this district, an identical suit, *Gillespie v. U.S.A.*, was brought in the Eastern District of Missouri. The case is entitled *Gillespie v. United States,* Civil No. 74-239-C(2). The three judge court in an opinion by Hon. John K. Regan disposed of the identical issues presented in *Gabriel v. United States,* 416 F. Supp. at 814 n.2.

Plaintiff made repeated efforts to convince the three judge court in this district to reconsider its order affirming the decision of the Interstate Commerce Commission. A motion for reargument was denied on May 29, 1976. A Letter-Opinion dated June 9, 1976 reads as follows: "The Court is in receipt of yet another motion for reconsideration of the Court's judgment. After consultation with the other two members of the Court, I am authorized to advise all parties that the motion is denied." Plaintiff's motion for reargument was denied on June 21, 1976 and another motion for reargument was denied on the following day.

After spending four years litigating the identical issues more or less simultaneously in three separate actions in a variety of forums and losing consistently, plaintiff attempted to take another bite from the apple when MoPac presented its plan for merger to the ICC. An extract from the ICC opinion of May 12, 1978 which deals with plaintiff's attempt to reopen the issues is quoted on page 8 of this report. It was at that point that plaintiff began this suit. Although plaintiff dropped out of the ICC proceedings, his brother, Napoleon, remained as a party of record and continued to flog the same issues in his petition for administrative review. It is clear beyond argument that all of the issues in this complaint which relate to the 1974 recapitalization are *res adjudicata.* The Supreme Court has recently restated the purposes

underlying the doctrines of *res judicata* and collateral estoppel as follows:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana v. United States,* 440 U.S. 147, 153-4 (1979).

Each of these purposes is implicated in Gabriel's attempt to circumvent prior rulings and to undermine proceedings currently underway in the Court of Appeals. *Kane v. City of New York,* 468 F. Supp. 586, 589 (S.D.N.Y. 1979).

Plaintiff's deliberate course of conduct over the past years in pursuing repeated baseless proceedings, all stemming from an identical fact situation demonstrates complete lack of good faith. Gabriel's pattern of copying or paraphrasing one complaint and motion from another and his past behavior of proceeding simultaneously in multiple suits in a variety of forums can show only this plaintiff's wish to harass the defendant by the abuse of legal process.

Particularly appropriate to this case are the words of *Hill v. Estelle,* 423 F. Supp. 690, 695 (S.D. Tex. 1976):

> It ... is within this Court's inherent power under 28 U.S.C. §1651(a) to enjoin litigants who are using the courts as a stage for their vendetta of harassment and abuse.

The court commented that a complaint, inflated with reference to law, cannot "camouflage the duplicitous and duplicative nature" of the claim.

> ... [T]he timing of the ... filing, the superficial changes in form between the ... complaints and the substantially idential nature of the complaints lead to the inexorable conclusion that plaintiffs maliciously have filed a complaint as to previously litigated matter in order to abuse the judicial process with the resultant effect of burdening the Court's already heavy caseload and obstructing the application of justice in more meritorious causes. 423 F. Supp. at 695.

Gambocz v. Yelencsics, 468 F.2d 837 (3rd Cir. 1972) involves a situation in which plaintiff's first suit was dismissed with prejudice on defendant's motion, the dismissal was affirmed on appeal and, while a petition for rehearing was still pending, a second suit was filed. It was held: "Injunctive relief was a proper remedy under the circumstances". 468 F.2d at 842. The court observed that *res judicata* barred a relitigation of the same subject. *Browning Debenture Holders Com. v. DASA Corp.*, 605 F.2d 35 (2nd Cir. 1979) holds that where an action is repetitious or intended to harass, a district court in the exercise of its equity jurisdiction and pursuant to the All Writs Statute, may enjoin plaintiff from further litigation based on facts previously alleged.

As noted in *Kane v. City of New York*, 468 F. Supp. at 590:

> It is true that litigious affinity alone does not support the grant of an injunction, for 'access to the Courts is one of the cherished freedoms of our

> system of government.' But when it becomes clear that the courts are being used as a vehicle for harassment by a 'knowledgeable and articulate experienced pro se litigant' who asserts the same claims repeatedly in slightly altered guise, the issuance of an injunction is warranted. (footnotes omitted)

In *Rudnicki v. McCormack*, 210 F. Supp. 905, 910 (D. Mass. 1962), appeal dismissed, 372 U.S. 226 (1963), it was said

> The English Courts have not hesitated to exercise the power thus vested in them by restraining what Professor Chafee refers to as 'pertinacious litigants' from abusing the process of the courts by the repeated institution of frivolous litigation.
>
> * * *
>
> The courts of the United States have also acted to enjoin a litigant from subjecting another to repeated, baseless and vexatious suits on the same subject matter, recognizing without question that such a course of conduct is a sufficient ground for the issuance of an injunction.

The historical background of the power is stated in *Higgins v. California Prune & Apricot Growers*, 282 F.2d 550, 557 (2nd Cir. 1922):

> It is elementary that these [equity] courts will interfere by injunction to prevent an inequitable

> use of legal processes, and their power to do so has been established since the decision of the Earl of Oxford's Case, 1 Ch. R. 1 determined the controversy between Lord Chancellor Ellesmere and Lord Chief Justice Coke in the times of Charles I.... In Story's Equity Jurisprudence (14th Ed.) §1226, it is said: 'Another class of cases to which the process of injunction is most beneficially applied is to suppress undue and vexatious litigation.'

It is submitted that an injunction is necessary in this case to insure the finality of judgments entered in this and other courts.

PERSONAL JURISDICTION

Although raised in the motion, the issue of personal jurisdiction over the defendants has not been briefed. The marshal's returns of service on the individual defendants indicate that they were not served in the manner provided by Rule 4(d)(1) or 7 Fed. R. Civ. P. Service on the individuals was made at a business address on persons connected with the business enterprise. Purported service on the New Jersey Commissioner of Motor Vehicles is, of course, no service in this case.

CONCLUSION

For the reasons stated it is respectfully recommended that the complaint be dismissed for lack of subject matter jurisdiction. It is respectfully recommended that plaintiff be permanently enjoined from instituting any suit in the federal court against any of these defendants or any other corporate officers or agents

regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

Respectfully submitted,

s/ Serena Perretti
SERENA PERRETTI
UNITED STATES MAGISTRATE

Dated: December 30, 1980

ORIGINAL TO THE CLERK

xc: .Hon. H. Lee Sarokin
.James C. Gabriel, P.O. Box 94, Sea Girt, N.J. 08750
.Leon Leighton, Esq., 25 Hadden Road, Scarsdale, N.Y. 08750

EXHIBITS

AFFIDAVIT OF ROBERT LeVASSEUR

STATE OF CONNECTICUT)
COUNTY OF NEW HAVEN)

Robert LeVasseur, being duly sworn, deposes and says:

1. At the time I intervened in 1968 as a plaintiff in a class action commenced by Betty Levin on December 29, 1967 in the United States District Court, Southern District of New York, Case #CIV 5095 (Edward Weinfeld), *Levin vs Mississippi River Corp.* 59 F.R.D. 353 (1973) I was the owner of 336 shares of Missouri Pacific Railroad Company Class B stock and 3000 shares of Class A stock of said railroad.

Dated: March 16, 1981
Waterbury, Connecticut

s/ Robert LeVasseur
Robert LeVasseur

VERIFICATION

STATE OF CONNECTICUT)
COUNTY OF NEW HAVEN)

ROBERT LeVASSEUR, being duly sworn, deposes and says that he has read the foregoing AFFIDAVIT and knows the contents thereof; that the same is true to the deponent's own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to these matters deponent believes it to be true.

Exhibits

Be it remembered that on this 16th day of March, 1981 personally appeared before me, a notary public of Connecticut, ROBERT LeVASSEUR, to me known and known to me to be the individual described herein and who has sworn to and executed the foregoing AFFIDAVIT, and he acknowledges to me that he executed the same.

Respectfully submitted,

s/ John J. Pacowta
My Commission Expires 4/85

I hereby certify that this
AFFIDAVIT is a TRUE COPY
of the original.

s/ Edwin G. Fisher
Notary Public of New Jersey
My Commission Expires Jan. 28, 1982

1199 199

(Continued from reverse side)

Dated June 5th, 1973

1199

JAMES C. GABRIEL
R D 1 BOX 16
COLTS NECK N J 07722

The undersigned acknowledges receipt of a copy of the Notice of such meeting and the accompanying Proxy Statement.

James C. Gabriel
AGAINST RECAPITALIZATION PLAN 1-0 SHARES CLASS B
(Signature of Stockholder)

IMPORTANT: Please sign exactly as name appears hereon. All joint owners should sign. When signing as Executor, Administrator, Attorney, Trustee or Guardian, please give full title as such. If a corporation, please sign full corporate name by authorized officer.

PLEASE SIGN, DATE AND RETURN YOUR PROXY PROMPTLY IN THE ENCLOSED ENVELOPE.

80-0713-8

QUESTIONS PRESENTED [1]

1. Whether Judge Lacey committed error in dismissing petitioner's fourth motion for reconsideration of Judge Sarokin's order, on the ground that the motion was not authorized by the Rules of the New Jersey District Court.

2. Whether, if Judge Sarokin's order is reviewable on this appeal, he committed error in:

   a. Dismissing petitioner's complaint with predjudice;

   b. Permanently enjoining petitioner from instituting suit in the Federal Court against these respondents regarding any matter alleged in the complaint that deals with the 1974 recapitalization of Missouri Pacific Railroad Company.

3. Whether Judge Lacey committed error in:

   a. Directing the Clerk not to accept, nor to docket, nor to submit to the Court any further papers in this case, except for Notice of Appeal;

   b. Permanently enjoining petitioner from instituting suit in any court against Judge Sarokin, the Clerk of the Court, or any of his subordinates, in respect of any matters involved in this action.

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1. Parent companies, Subsidiaries and Affiliates of respondents and of related companies are listed in Appendix I.

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III. THERE IS NO ERROR IN JUDGE LACEY'S ORDER:

(A) DIRECTING THE CLERK NOT TO ACCEPT NOR TO DOCKET NOR TO SUBMIT TO THE COURT ANY FURTHER PAPERS IN THIS CASE, EXCEPT FOR NOTICE OF APPEAL; (B) PERMANENTLY ENJOINING PETITIONER FROM INSTITUTING SUIT IN ANY COURT AGAINST JUDGE SAROKIN, THE CLERK OR ANY OF HIS SUBORDINATES, IN RESPECT OF ANY MATTERS INVOLVED IN THIS CASE 11

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No. 82-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES C. GABRIEL, Pro Se,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS AND JUDGMENTS BELOW

Judge Lacey's order, from which this appeal is taken, (a) denied petitioner's fourth motion for reconsideration of Judge Sarokin's order of April 7, 1981; and (b) contained affirmative directions to the Clerk and to petitioner. That order, with its findings of fact and conclusions of law, appears at Pet. 2a-17a.

Judge Sarokin's order appears at Pet. 18a-19a. The Report and Recommendation of Magistrate Perretti, which Judge Sarokin adopted as the Opinion of the Court, appears at Pet. 20a-44a. Judge Sarokin's opinion on reconsideration appears at Pet. 6a-7a.

The Third Circuit's order of affirmance appears at Pet. 48a. Its order denying reconsideration *in banc* appears at Pet. 1a.

STATUTES AND RULES INVOLVED

Rule 12(I) of the New Jersey District Court provides:

> "A motion for re-argument shall be served and filed within 14 days after the filing of the court's order or judgment on the original motion. There shall be served with the notice a memorandum, setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be re-argued orally."

Rule 23, Fed.R.Civ.P., and the pertinent portions of 49 U.S.C. § 20a are printed in Appendix II.

STATEMENT

A. *Course of proceedings below.*

Respondent Missouri Pacific Railroad Co. of Missouri (MoPac) emerged from bankruptcy pursuant to an "Agreed System Plan" approved by the Interstate Commerce Commission in 1956. It had two classes of stock: A (voting) and B (non-voting). (Pet. 22a-23a).

Petitioner owns what was formerly Class B stock (Pet. 3a). Respondent Missouri Pacific Corporation (MPC), formerly Mississippi River Corporation, owned a majority of the A stock. (Pet. 22a-23a) By a 1974 recapitalization plan, each share of B stock was converted into new common stock (Pet. 3a).

Petitioner's complaint demanded (a) declaratory relief fixing the valuation of the B shares according to a formula contained in the "Agreed System Plan"; and (b) an injunction to prevent MoPac and MPC from proceeding before the Commission with a second recapitalization plan which was approved in 1978 (Pet. 21a). A jury trial was demanded. (Pet. 3-4).

For the reasons stated in Magistrate Perretti's Report, Judge Sarokin dismissed the complaint with prejudice. He permanently enjoined petitioner "from instituting any suit in the Federal Court against any of these defendants or any other corporate officers or agents regarding any matter alleged in the complaint that deals with the 1974 recapitalization." (Pet. 18a-19a)

Although this order was entered on April 7, petitioner did not file a notice of appeal until July 31 (1-a to 2-a). Instead, he filed four motions for reconsideration.

The first three motions were denied by Judge Sarokin (Pet. 8a-9a). The fourth motion was reassigned to Judge Lacey, inasmuch as petitioner had filed with it a claim against Judge Sarokin for an alleged deprivation of rights in the amount of $35,000,000 (Pet. 2a).

Judge Lacey made the following conclusions of law (Pet. 15a):

> "1. Rule 12(I) authorizes a single motion for reargument; it does not permit more than one.
>
> 2. This rule cannot be circumvented by plaintiff's procedure of moving to reconsider an Order, and upon denial of that motion, moving to reconsider the Order of Denial.
>
> 3. Plaintiff's motion of June 15, 1981, repeated on June 23, 1981, being the fourth motion to reconsider Judge Sarokin's Order of Dismissal April 7, 1981, should be dismissed as not authorized by the Rules.
>
> 4. If plaintiff's foregoing motions were subject to consideration on the merits they would have to be denied, inasmuch as they do not set forth any relevant matters or controlling decisions which the Court has overlooked."

Accordingly, he dismissed the motions for reconsideration, and denied them on the merits (Pet. 16a).

Judge Lacey made the following additional conclusions of law (Pet. 16a):

> "5. The actions of plaintiff and of his brother described in the Findings of Fact and in the Report, establish the strong probability that plaintiff may continue to bombard this Court and defendants with additional repetitive papers. The Court has jurisdiction to direct the Clerk to refuse to accept, docket or submit to the Court any further papers in this action, except for a Notice of Appeal.
>
> 6. The above described actions of plaintiff and his brother establish the strong probability that plaintiff may institute suit for substantial damages against Judge Sarokin, and against the Clerk and his subordinates. The Court has jurisdiction to enjoin such frivolous and vexatious litigation, intended to harass those persons in the

> performance of their official duties, and using the courts as a stage for plaintiff's vendetta of harassment and abuse, with the result of burdening the heavy case loads of the courts and obstructing the application of justice in more meritorious cases (see Report [Pet. 35a-43a])."

His order contained the following directions (Pet. 16a-17a):

> "3. The Clerk of this Court is directed not to accept, nor to docket, nor to submit to the Court any further papers in this case, except for Notice of Appeal.
>
> 4. Plaintiff is permanently enjoined from instituting suit in any court against Judge Sarokin, the Clerk of this Court, or any of his subordinates, in respect of any matters involved in this action."

After the foregoing order was served on petitioner, he submitted seven additional pleadings in the District Court, all of which were rejected by the Clerk. He filed four petitions for mandamus in the Court of Appeals for the same relief, all of which were denied. Four applications for reconsideration *in banc* of those denials were likewise denied.

Petitioner's brief in the Court of Appeals contains the following statement (p. 27):

> "Plaintiff's rights have been completely and totally ignored, the sum of $35,000,000. So I am holding the Honorable Sarokin Court liable for the sum of $35,000,000 damages—in other words—Hon. Sarokin Court, please be careful, millions of dollars are at stake. This is a caution warning—don't treat it like dirt."

The Third Circuit affirmed Judge Lacey's judgment "after consideration of the contentions raised by appellant" (Pet. 48a) and denied rehearing *in banc* (Pet. 1a).

B. *The 1974 Recapitalization*

1. *The Southern District Court Action.*

Three Class B stockholders brought a representative action against MPC and MoPac to compel payment of higher dividends on the B stock. Judge Bryan certified the case as a class action within the provisions of Rule 23(a)(b)(1) and (2), Fed. R. Civ.

P., the members of the class being all of the Class B stockholders (Pet. 35a-36a). Petitioner participated actively in that litigation (Pet. 4a).

The suit resulted in a settlement providing that each B share would be exchanged for 16 shares of new common stock plus $850 in cash. Judge Weinfeld approved the settlement in a comprehensive opinion. *Levin* v. *Mississippi River Corporation*, 59 F.R.D. 353 (S.D.N.Y. 1973), affd. on Judge Weinfeld's opinion below *sub nom. Wesson* v. *Mississippi River Corporation*, 486 F.2d 1398 (2d Cir. 1973), cert. den. *sub nom. Wesson* v. *Levin*, 414 U.S. 1112 (1973) reh. den. 415 U.S. 937 (1974). (Pet. 4a).

The judgment declared "[t]hat the terms and provisions of the Stipulation of Settlement . . . are fair, reasonable, adequate and proper to [MoPac] and to the members of the Class consisting of all of the Class B stockholders . . ." (3-a to 5-a). This finding is binding on petitioner as a member of the class (Pet. 35a-36a).

Judge Weinfeld found the value of the exchange package to equal approximately $2,450 for each Class B share, which he found to be its fair value. 59 F.R.D., at 368-371. Petitioner's brief in the Third Circuit claimed a value of $22,500 for each share.

After denial of rehearing by this Court, three motions to vacate the judgment were denied by Judge Weinfeld. The first denial was affirmed by the Second Circuit, certiorari and rehearing were denied by this Court, and a second petition for rehearing was rejected by the Clerk. The second denial was affirmed by the Second Circuit, which denied reconsideration *en banc*, and subsequently stated that "this Court will not consider any further motions for reconsideration in this appeal." Judge Weinfeld found the third motion "vexatious" (Pet. 36a-37a).

Petitioner argues that LeVasseur, one of the three class representatives, had a conflict of interest because of ownership of both A and B stock. He argues further that Alleghany, a second class representative, had a conflict because of the Jones Motor Co. Transaction, and that this conflict was not disclosed to Judge Weinfeld (Pet. ii-iii; 45a-46a). No claim is made that there was any conflict on the part of Levin, the third class representative.

Judge Weinfeld found no merit in the allegation about Alleghany (Pet. 36a). He subsequently allowed the attorneys for Levin and LeVasseur $1,750,000, and approved reimbursement of $850,000 to Alleghany which it had paid to its attorneys. *Levin* v. *Mississippi River Corp.*, 377 F.Supp. 926, 930-932 (S.D.N.Y. 1974), affd. 508 F.2d 826 (2nd Cir. 1974), cert. den. *sub nom. Gabriel* v. *Levin*, 421 U.S. 915 (1975), reh. den. 421 U.S. 1006 (1975). He said: "The effectiveness and skill of the attorneys who espoused the interests of the Class B stockholders are attested to by the settlement itself." 377 F.Supp. at 931.

2. *The Commission's § 20a Proceeding.*

The Stipulation of Settlement required that Commission approval be obtained for the recapitalization. 59 F.R.D. at 361. Accordingly, application was made, pursuant to 49 U.S.C. § 20a, for authorization to issue the new common stock, and to exchange 16 such shares plus $850 in cash for each share of B stock. Petitioner participated actively in that proceeding. 347 I.C.C., *infra* at 397.

The Commission similarly wrote a comprehensive report approving the application. It concluded that the proposed plan of recapitalization "is fair and reasonable to all parties in interest, that it is in the public interest, and that the proposed issuance of securities meets the statutory requirements of section 20a and conforms generally with the purposes and objectives of the national transportation policy declared by Congress." *Missouri Pacific Railroad Co. Securities*, 347 I.C.C. 377, 417 (1973), affd. *sub nom. Gabriel* v. *United States*, 416 F.Supp. 810 (D.N.J. 1976) affd. 429 U.S. 1011 (1976) reh. den. 429 U.S. 1124 (1977). The Commission's order was also affirmed *sub nom. Gillespie* v. *United States*, Civ. No. 74-239-C(2) (E.D Mo. 1974). (Pet. 4a). This unreported decision is printed in 6-a to 13-a. The Commission concluded that the offer of $2,450 per share "represents fair value." 347 I.C.C. at 411.

Prior to the decision of the New Jersey Court, petitioner sought unsuccessfully by a multiplicity of motions to compel the joinder of the Internal Revenue Service as party plaintiff. After the

decision, petitioner made repeated efforts (four motions for reargument [Pet. 4a]) to convince the Court to reconsider its order affirming the Commission decision. (Pet. 38a-39a).

C. *The 1978 Recapitalization.*

In 1977, respondents MoPac and MPC filed with the Commission a petition, pursuant to 49 U.S.C. § 20a, for approval of the exchange of stock of MPC for all of the outstanding minority shares of MoPac. That is the proceeding which the instant complaint sought to enjoin (Pet. 5a).

The Commission found that the exchange offer was fair to the minority stockholders, and approved the application. *Missouri Pacific Railroad Company-Merger*, 360 I.C.C. 6, 15-20 (1978), affd. *sub nom. Wesson* v. *Interstate Commerce Commission*, No. 79-1513 (D.C. Cir. 1981)[1] This unreported judgment is printed in 14-a to 15-a.

Petitioner was a party of record in that proceeding (Pet. 27a). On May 12, 1978, the Commission entered an order reciting the decisions described in subd. B. *supra*, approving the 1974 recapitalization, and concluding (Pet. 28a):

> "Unwilling to accept the finality of those determinations, the noted commentators [including petitioner] have never exchanged their old Class B shares for the presently outstanding MoPac Common Stock, and would now have us reconsider the recapitalization proceedings. The Commission and the courts have fully reviewed and approved the recapitalization, however, and the matter is now *res judicata*".

The instant complaint was filed on July 3, 1978. Magistrate Perretti said: "It must be concluded that the plaintiff filed this action as a direct response to the Commission's decision of May 12, 1978." (Pet. 28a). "Although plaintiff dropped out of the I.C.C. proceedings, his brother, Napoleon, remained as a party of record and continued to flog the same issues in his petition for administrative review" (Pet. 39a).

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1. Consolidated with No. 79-1514, *Napoleon Gabriel* v. *Interstate Commerce Commission*.

On that administrative review, the Commission said (*Missouri Pacific Railroad Company-Merger*, 360 I.C.C. 202, 203-204 [1979] affd. *sub nom. Wesson* v. *Interstate Commerce Commission, supra*):

> "Mr. Gabriel seeks evaluation of his class B common stock according to the 1956 reorganization of MoPac. He (a) contends that the terms of the 1974 recapitalization of MoPac do not bind him since he dissented to that action; (b) alleges certain improprieties in the Court and Commission proceedings authorizing the 1974 recapitalization, . . ."
>
> * * *
>
> ". . . By seeking evaluation of unexchanged class B stock the protestants are in fact attempting a re-examination of issues finally determined in previous proceedings . . ."
>
> * * *
>
> ". . . The holders of class B stock certificates have no rights cognizable in the instant proceedings simply by reason of their dissension to the 1974 recapitalization and their refusal in the intervening years to exchange those certificates."

In affirming the Commission's order, the D.C. Circuit said (14-a to 15-a):

> "Petitioner's have engaged for several years in a quest to receive more for their class B stock than they were allotted in the 1974 recapitalization of Missouri Pacific Railroad Company. They have presented and re-presented their claim in several contexts and forums. We have reviewed the ponderous papers filed by the parties and the prior adjudications in point. Based on this review, we find the Commission's conclusion irresistible."

A petition for rehearing *en banc* by Napoleon Gabriel was denied (Pet. 13a). A second motion by Napoleon Gabriel for reconsideration of the foregoing denial was rejected as "not an authorized or proper submission," and the Court *en banc* directed the Clerk to return the motion unfiled (Pet. 13a-14a).

Despite this direction, Napoleon Gabriel submitted two further motions for reconsideration of the order denying *en banc* reconsideration. The second motion stated: "I am holding the Clerk of

this Court personally responsible for the $25,000,000 MoPac Class B values." The last two motions were neither docketed nor submitted to the Court (Pet. 14a-15a).

SUMMARY OF ARGUMENT

1. There is no error in Judge Lacey's dismissal of petitioner's fourth motion for reconsideration of Judge Sarokin's order.

2. If Judge Sarokin's order is reviewable on this appeal there is no error in his order:

(a) Dismissing petitioner's complaint with prejudice;

(b) Permanently enjoining petitioner from instituting any suit in the Federal Court against these respondents regarding any matter alleged in the complaint that deals with the 1974 recapitalization.

3. There is no error in Judge Lacey's order:

(a) Directing the Clerk not to accept, nor to docket, nor to submit to the Court any further papers in this case except for Notice of Appeal;

(b) Permanently enjoining petitioner from instituting suit in any court against Judge Sarokin, the Clerk, or any of his subordinates, in respect of any matters involved in this action.

ARGUMENT

I.

THERE IS NO ERROR IN JUDGE LACEY'S DISMISSAL OF PETITIONER'S FOURTH MOTION FOR RECONSIDERATION OF JUDGE SAROKIN'S ORDER.

Judge Lacey was clearly correct in concluding that Rule 12(I) of the New Jersey District Court authorizes only a single motion for reargument. "Any other construction of the [Rule] would defeat its purpose" " 'to set a definite point of time when litigation shall be at an end'." *Cf. Browder* v. *Director, Ill. Dept. of Correction,* 434 U.S. 257, 264 (1978). The D.C. Circuit placed a similar construction on F.R.A.P. Rule 40 (Pet. 13a-14a).

II.

IF JUDGE SAROKIN'S ORDER IS REVIEWABLE ON THIS APPEAL, THERE IS NO ERROR IN HIS ORDER:

(a) DISMISSING PETITIONER'S COMPLAINT WITH PREJUDICE,

(b) PERMANENTLY ENJOINING PETITIONER FROM INSTITUTING ANY SUIT IN THE FEDERAL COURT AGAINST THESE RESPONDENTS REGARDING ANY MATTER ALLEGED IN THE COMPLAINT THAT DEALS WITH THE 1974 RECAPITALIZATION.

A. *Reviewability of Judge Sarokin's Order.*

Judge Sarokin's order was filed on April 7, 1981 (Pet. 18a-19a). The Notice of Appeal was not filed until July 31 (1a to 2-a), after Judge Lacey had denied petitioner's motion for reconsideration.

Petitioner's fourth motion for reconsideration of Judge Sarokin's order does not bring him within the ambit of the cases "which have held that when a court considers on its merits an untimely petition for a rehearing, . . . the time for appeal may begin to run anew from the date on which the court disposed of the untimely application." *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 210 (1952) (footnote omitted). This is so for two reasons.

First, that exception applies only to a first motion to reconsider, not to subsequent motions for the same relief, especially if the time to appeal from the original order has expired. *Ellis* v. *Richardson*, 471 F.2d, 720-721 (5th Cir. 1973); *Needham* v. *White Laboratories, Inc.*, 639 F.2d 394, 397-398 (7th Cir. 1981), *rehearing en banc denied; Hines* v. *Seaboard Air Line Railroad Company*, 341 F.2d 229, 231-232 (2d Cir. 1965).

Secondly, the extension applies only when a rehearing is granted, and the court undertakes a complete review of the merits as the basis for denying the motion. It does not apply here, where the motion was dismissed as not authorized by Rule 12(1) of the District Court. And even if subject to consideration on the merits, it would have to be denied inasmuch as it did "not set forth any relevant matters or controlling decisions which the Court has overlooked" (Pet. 15a), as required by the Rule. *Cf. Pfister* v. *Finance Corp.*, 317 U.S. 144, 150-151 (1942).

B. ***Dismissal of the Complaint.***

The claim for a declaration fixing the valuation of the Class B shares according to a formula contained in a certain agreed systems plan was properly dismissed on the ground of *res judicata*, for the reasons stated in Magistrate Perretti's Report (Pet. 35a-40a). As the D.C. Circuit said (15-a): ". . . [W]e cannot conceive a case more appropriately subject to the law of *res judicata*."

The claim to enjoin the 1977 recapitalization was properly dismissed on the ground of lack of subject matter jurisdiction, for the reasons stated in Magistrate Perretti's Report (Pet. 27a-35a). The recapitalization was consummated on November 1, 1978, pursuant to the order of the Interstate Commerce Commission. *Missouri Pacific Railroad Company-Merger*, *supra*, 360 I.C.C. 202, 203 (1979).

C. ***Injunction of Further Proceedings Against Defendants.***

Respondents' motion to enjoin petitioner from further proceedings against respondents "regarding any matter alleged in the complaint that deals with the 1974 recapitalization" was properly granted for the reasons stated in Magistrate Perretti's Report (Pet. 40a-43a), and in Judge Sarokin's opinion (Pet. 6a-7a). This necessity is confirmed by the many papers filed by petitioner subsequent to the order appealed from (p. 4, *supra*).

III.

THERE IS NO ERROR IN JUDGE LACEY'S ORDER:

(a) DIRECTING THE CLERK NOT TO ACCEPT NOR TO DOCKET NOR TO SUBMIT TO THE COURT ANY FURTHER PAPERS IN THIS CASE, EXCEPT FOR NOTICE OF APPEAL;

(b) PERMANENTLY ENJOINING PETITIONER FROM INSTITUTING SUIT IN ANY COURT AGAINST JUDGE SAROKIN, THE CLERK, OR ANY OF HIS SUBORDINATES, IN RESPECT OF ANY MATTERS INVOLVED IN THIS CASE.

A. ***The Direction to the Clerk.***

The innumerable motions for reargument by petitioner from the decision of Judge Weinfeld, and from the three-Judge District Court in New Jersey; the four motions for reconsideration in the District Court in this case; the seven pleadings submitted after Judge Lacey's order was served upon appellant; the four petitions

for mandamus and the four petitions for *en banc* rehearing of the denial of those petitions; the petitions of Napoleon Gabriel in the D.C. Circuit Court of Appeals: all amply support Judge Lacey's conclusion that "the actions of plaintiff and of his brother . . . establish the strong probability that plaintiff may continue to bombard this Court and defendants with additional repetitive papers" (Pet. 16a).

This restriction against filing further papers is the only sanction which will protect the court and defendants. This is the sanction found appropriate by the D.C. Circuit, and by the Second Circuit (pp. 5, 8, *supra*).

B. ***The Injunction Prohibiting Suits Against Judge Sarokin and the Clerk or his Subordinates.***

The threat to sue Judge Sarokin for $35,000,000 in appellant's fourth motion, repeated in his brief in the Court of Appeals; and the threat by his brother, his *alter ego*, to sue the Clerk of the D.C. Circuit Court of Appeals for $25,000,000, amply justify Judge Lacey's conclusion that "the above described actions of plaintiff and his brother establish a strong probability that plaintiff may institute suit for substantial damages against Judge Sarokin and against the Clerk and his subordinates" (Pet. 16a). The discussion justifying protection for defendants would apply *a fortiori* to an injunction protecting Judge Sarokin and the Clerk.

CONCLUSION

Since the petition does not satisfy any of the requirements of Rule 17 of this Court, it should be denied.

Respectfully submitted,

LEON LEIGHTON
Attorney for Respondents
25 Hadden Road
Scarsdale, New York 10583
(914) 472-4521

November 19, 1982

APPENDIX I

Parent Companies, subsidiaries and affiliates of respondents.

Missouri Pacific

Abilene & Southern Railway Company
Alton & Southern Railway Company, The
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Belt Railway of Chicago
Brownsville & Matamoros Bridge Company
Chicago & Western Indiana Railway Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railway
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Illinois Terminal Railroad Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Mississippi River Transmission Company
Missouri Improvement Company
Missouri Pacific Airfreight, Inc.
Missouri Pacific Corporation
Missouri Pacific Equipment Corp.
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
MRT Exploration Company
Park Spring, Inc.
Pueblo Union Depot and Railroad Company, The
Ric-Con Corporation
Southern Illinois and Missouri Bridge Company
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Weatherford Mineral Wells and Northwestern Railway Co., The

Appendix I

By decision dated October 20, 1982, the Interstate Commerce Commission authorized acquisition by Union Pacific Corporation of control of respondents Missouri Pacific Corporation and of Missouri Pacific Railroad Company; and also of Western Pacific Railroad Company. *Union Pacific—Control—Missouri Pacific, Western Pacific*, 366 I.C.C. 459. The following lists the parent companies, subsidiaries and affiliates of Union Pacific Corporation and of Western Pacific Railroad Company.

Union Pacific

Bitter Creek Coal Company
Calnev Pipe Line Company
Camas Prairie Railroad Company
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin Indonesia, Inc.
Champlin International Petroleum Company
Champlin Peru, Inc.
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Philippines, Inc.
Champlin Pipeline, Inc.
Champlin Trading Company
Denver Union Terminal Railway Company, The
Des Chutes Railraad Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
Mount Hood Railway Company
Ogden Union Railway and Depot Company, The
Oregon Short Line Railroad Company
Oregon-Washington Railroad & Navigation Company
Pacific Subsidiary, Inc.

Appendix I

Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Separation Creek Coal Company
Spokane International Railroad Company
St. Joseph and Grand Island Railway Company, The
St. Joseph Terminal Railroad Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Foundation
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Resources Corporation
Union Pacific Resources Ltd.
Union Subsidiary, Inc.
UP Leasing Corporation
UP Subsidiary Corporation
Upland Industries Corporation
Wasatch Insurance Limited
Winton Coal Company
Yakima Valley Transportation Company

Western Pacific

Alameda Belt Line
Central California Traction Company
Delta Finance Company Ltd.
Oakland Terminal Railway
Sacramento Northern Railway
Standard Realty and Development Company
Tidewater Southern Railway Company
WPX Freight System, Inc.

APPENDIX II

49 U.S.C.

§ 20a. *Securities of carriers; issuance, etc.*

* * * * *

Issuance of securities; assumption of obligations; authorization

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect to the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

* * * * *

Scope of commission's authority

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms

and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, of the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

* * * * *

Jurisdiction of commission as exclusive and plenary

(7) The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

Rule 23. Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of

members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

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NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, NEW JERSEY

JAMES C. GABRIEL,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M. M. HENNELLY, JOHN H. LLOYD, D. B. JENKS AND THOMAS H. O'LEARY,

Defendants.

Civil No. 78-1476 JURY TRIAL

Notice of Appeal

To: The Third Circuit
Court of Appeals

TO: THE CLERK OF THE COURT
HON. ANGELO W. LOCASCIS

Sir:

PLEASE TAKE NOTICE that James C. Gabriel, on behalf of himself appeals to the United States Court of Appeals, Third Circuit, the final Order or Judgment dated the 22nd day of July, 1981 of the Federal District Court, District of New Jersey, Newark, New Jersey, Docketed and Entered and Filed July 23, 1981,

in the above Captioned Case and appeals each and every prior Order and Decision of the said Court which supports the said Judgment or Order.

Respectfully,

[JAMES C. GABRIEL]
James C. Gabriel, Pro Se
P. O. Box 94,
Sea Girt, New Jersey 08750

Monmouth County
State of New Jersey
Dated: July 31, 1981

Service to:
HON. U. S. D. J. F. B. LACEY
HON. U. S. D. J. J. LEE SAROKIN
MAGISTRATE SERENA PERRETTI
THE OFFICE OF THE COMMISSIONER
PAUL E. GRAHAM, ESQ.
LEON LEIGHTON

FINAL JUDGMENT OF JUDGE WEINFIELD

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 5095 (EW)

BETTY LEVIN, ALLEGHANY CORPORATION AND ROBERT LEVASSEUR,

Plaintiffs,

—against—

MISSOURI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T.C. DAVIS and THOMAS F. MILBANK,

Defendants.

The parties to this action having submitted to the Court for its approval, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, a Stipulation of Settlement dated December 18, 1972; and

By Order dated December 20, 1972, the Court having directed that a hearing be held on January 25, 1973, to determine whether the terms and provisions of the Stipulation of Settlement were fair, reasonable, adequate and proper and should be approved, and to determine whether final judgment should be entered in accordance with the Stipulation of Settlement and having directed that notice of the settlement hearing be given to the MoPac stockholders in a manner specified in the order; and

Notice of the hearing having been given to the stockholders in accordance with the order of December 20, 1972, it having been mailed, on December 27, 1972, to all stockholders of record of defendant Missouri Pacific Railroad Company, as of the close of

business on December 26, 1972, and it having been published in the national edition of *The Wall Street Journal* on December 27, 1972; and

On January 25, 1973, a hearing having been held to determine whether the proposed settlement embodied in the terms and provisions of the Stipulation of Settlement should be approved and at that hearing an opportunity having been provided for all proponents of and objectors to the proposed settlement to be heard and to submit papers for the consideration of the Court; and

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion on March 19, 1973, and having determined that a final judgment should be entered; it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the terms and provisions of the Stipulation of Settlement dated December 18, 1972, are fair, reasonable, adequate and proper to the Missouri Pacific Railroad Company and to the members of the class consisting of all of its Class B stockholders, and the same are hereby approved, as per the opinion of the Court dated March 19, 1973.

2. That the notice to the stockholders of the hearing was fair, adequate and sufficient and constituted compliance with Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure.

3. That any and all objections to the terms and provisions of the Stipulation of Settlement are hereby overruled.

4. That the parties to the Stipulation of Settlements are hereby authorized and directed to consummate the settlement of this action pursuant to the terms and provisions of the Stipulation of Settlement.

5. That thereupon the Complaint and Amended Complaint of Betty Levin, the Complaint and Amended Supplemental Complaint of Alleghany Corporation, and the Complaint of Robert LeVasseur are hereby dismissed as against all defendants on the merits, with prejudice and without costs to any party.

6. That the Court retains jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fee and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation.

Dated: New York, New York
May 2, 1973

EDWARD WEINFELD
U.S.D.J.

Judgment entered:
May 2, 1973

THOMAS E. ANDREWS
Acting Clerk

JUDGMENT OF MISSOURI EASTERN DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LABELLE GILLESPIE,
Plaintiff,

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION,
Defendants,
MISSOURI PACIFIC RAILROAD COMPANY,
Intervenor-Defendant.

Nov. 14, 1974

WILLIAM D. RUND,
Clerk
U.S. DISTRICT COURT
E. DISTRICT OF MO.

No.74-239-C(2)

Before WEBSTER, Circuit Judge, WANGELIN and REGAN, District Judges.

REGAN, Judge

By this action heard to a three-judge court, plaintiff seeks to set aside and annul orders of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act granting authority to the Missouri Pacific Railroad Company (MoPac) to issue securities in connection with a plan of recapitalization. Plaintiff is one of several MoPac stockholders who opposed the plan both before the Commission and previously. We have jurisdiction under Sections 1336(a), 1398(a), 2284 and 2321-2325, 28 U.S.C.

The background of this controversy is set forth in detail both in the comprehensive 71 page report of the Commission and in Judge Weinfeld's opinion in *Levin* v. *Mississippi River Corporation*, D. C. N.Y., 59 FRD 353. We briefly summarize.

MoPac is a Missouri corporation which was reorganized in 1956 under Section 77 of the Bankruptcy Act (Section 205, 11 U.S.C.). Upon reorganization, MoPac was authorized to issue two classes of $100 stated capital no par stock: Class A which

was issued to former preferred stockholders and Class B issued to former common stockholders. Class A stock was preferentially entitled to non-cumulative dividends of not to exceed $5 per share annually. Each share of both classes was entitled to one vote. Class A stock, which constituted 98 per cent of the total stock, had operational control over the corporation (e.g., power to elect the Board of Directors), but in certain other important areas such as mergers, consolidations and reorganizations involving the issuance of additional stock or the alteration of rights of either class of stock, the separate consent of a majority of both classes was required, thus giving a majority of the numerically small number of Class B shares veto power over such matters. See *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162.

By 1963, Mississippi River Corporation (Mississippi) had acquired a majority of the Class A shares while Alleghany Corporation (Alleghany) had become the owner of a majority of the Class B shares. Thus, since 1963, Mississippi has elected MoPac's Board of Directors and Alleghany exercised a veto power independent of the other Class B shareholders as to any corporate action necessitating Class B shareholder approval.

Understandably, because of MoPac's increased earnings and other factors, Class B shareholders, led by Alleghany, had become dissatisfied, to say the least, with MoPac's dividend policy of paying only $5 per share annually on Class B stock. As a result, a class and derivative action (*Levin* v. *Mississippi River Corporation*, supra) was instituted in which it was alleged, inter alia, that the defendants were parties to a conspiracy to "freeze out" Class B stockholders by various methods including the payment of unreasonably low dividends, that Mississippi had misused its majority voting power, and that defendants had breached their fiduciary duties. The major relief sought was an order compelling the payment of higher past and future dividends. The director defendants in that suit asserted that their dividend policy was justified by prudent business judgment made in good faith.

Judgment of Missouri Eastern District Court

Thereafter, commencing in 1968 and continuing until the latter part of 1972, the parties to the *Levin* litigation (including Alleghany, two other minority B stockholders, Mississippi and MoPac) undertook extensive and thorough pre-trial discovery, following which a settlement was agreed upon on the basis of a restructured capitalization which would, if consummated, eliminate the underlying cause of the constant stress between Class A and Class B shareholders.

On March 19, 1973, in an exhaustive opinion, Judge Weinfeld approved the proposed settlement as fair and reasonable, noting that "it offered a permanent solution to the long-standing impasse between the two contending groups of stockholders." 59 FRD at 373. The District Court decision was affirmed without opinion on appeal by the Second Circuit, 486 F.2d 1398, and certiorari was denied.

As summarized by Judge Weinfeld, the settlement provided for a Plan of Recapitalization and a proposed Amendment to MoPac's Articles of Association subject to its stockholders' approval to bring about the following:

> "(1) [E]ach share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,057 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;
>
> (2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac."

Thus, in addition to the required approval of the Interstate Commerce Commission for the issuance of the new shares, the recapitalization plan could not have been effected without the consent of 75 per cent of the outstanding stock of each class including a majority of the shares of each such class held by others than Mississippi and Alleghany. Substantially more than

the necessary number of shares having voted in favor of the recapitalization plan, the issue before the Interstate Commerce Commission was whether it should grant its approval under Section 20a to issue the securities called for in the plan of recapitalization.

After a hearing at which all parties were accorded the right to present evidence and arguments, the Commission issued its report and order on December 14, 1973, granting MoPac's application, the order being made effective immediately in view of the deadline set forth in the settlement agreement. On December 28, 1973, the Commission denied petitions to stay the effective date of its December 14, 1973 order, and on January 23, 1974, it denied petitions for reconsideration of that order. On March 4, 1974, the Commission denied petitions seeking a finding that an issue of general transportation importance is involved. The plan of recapitalization was consummated on January 21, 1974, and this suit followed on April 2, 1974.

The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any manner permitted by the laws of Missouri. And Section 388.220, R.S.Mo., specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was the very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be "for some lawful object within [MoPac's] corporate purposes and compatible with the public interest," and would be "reasonably necessary and appropriate for such purpose."

The Commission recognized that the rights of minority stockholders are a part of the public interest, so that in determining

whether the transaction was "compatible with the public interest," it was required "to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders."

In reaching its conclusion that the proposed plan was in the best interest of the stockholders and the carrier and was compatible with the public interest, the Commission considered the fact that the recapitalization plan had been agreed upon after extensive arms-length bargaining between MoPac, Mississippi, and Alleghany, and approved by the court in the *Levin* case, the value per share of the Class A and Class B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearing, and the arguments and contentions in their briefs. In addition, consideration was given to the fact that the elimination of the veto power held by the Class B stock would have the effect of simplifying the structure of MoPac stock and that the conversion feature of the new stock might result in an all-common stock structure. It was the opinion of the Commission that the proposed plan would provide an effective means for the payment of higher dividends, would render equity financing more feasible, would more equitably distribute the voting power among the stockholders, would eliminate the confusion between Class A and B stockholders and would thereby enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.

The principal contention of plaintiff and other minority Class B stockholders to the effect that the recapitalization plan unlawfully deprived them of a substantial portion of the full value of their Class B stock. In large part, the protestants, including plaintiff, argued that the Class B stock, at the minimum, should have been valued at "book value" ($9000 per share) if not at a higher up-dated valuation in excess of that figure.

The claim was considered at length by the Commission in light of the pertinent evidence. In rejecting "book value" as the measure of the actual value of the Class B stock, the Commission held

that bookkeeping entries evidencing "book value" are of little significance in measuring the actual value of a going company such as MoPac. Instead, based on the testimony of expert witnesses, the Commission utilized the capitalized earnings method, as the result of which it held that the Class B shareholders would in fact receive "value for value." See in this connection the enlightening discussion in *Levin* v. *Mississippi River Corporation*, supra, 59 FRD lc 369ff; *Schwabacher* v. *United States*, 334 U.S. 182; and *Borg* v. *International Silver Company*, 2 Cir., 11 F.2d 147, 152.

Other contentions of plaintiff, rejected by the Commission, included: (1) that an "immutable" contract was created by the 1956 plan of reorganization which could not be altered over the dissent of a single Class B shareholder; (2) that the settlement plan approved by Judge Weinfeld has a "congenital defect" in that the *Levin* suit for dividends was "illegally" converted into a suit for recapitalization; (3) that the settlement plan was "forced" upon the Class B shareholders by "court fiat;" (4) that the proxy statement for the stockholders' meeting was false and misleading; and (5) that MoPac, Mississippi, and their respective boards' directors were guilty of conspiracy, fraud and deceit.

We agree that the Commission's findings on these issues were warranted. So, too, we find no merit to plaintiff's further assertion that Alleghany "sold out" the other Class B stockholders by entering into the settlement agreement. As the Commission noted in its report: "Alleghany as the majority owner of the Class B stock has spent considerable sums of money over the years to protect its interest. It is the party to the agreement that has the most to gain and the most to lose. Under the circumstances, there is little or no likelihood that Alleghany would agree to surrendering its stock for less than fair value. Besides all the evidence of record contraindicates that Alleghany agreed to accept less than fair value."

Our sole function in this proceeding is to determine whether the orders of the Commission are supported by substantial evidence

on the whole record and do not involve an error of law. *Norfolk & Western Railway Co.* v. *United States*, D. C. Mo., 316 F.Supp. 1396, 1399. In our judgment, the Commission applied correct legal standards in its consideration of the application and its ruling thereon. The evidence before the Commission, which is summarized in its report and which need not be here repeated, amply supports the order granting MoPac's application.

Accordingly, judgment will be entered affirming the orders of the Commission and dismissing the complaint.

Dated this 14th day of November, 1974.

WILLIAM H. WEBSTER

Judge, U. S. Circuit Court

JOHN K. REGAN

Judge, U. S. District Court

H. KENNETH WANGELIN

Judge, U. S. District Court

JUDGMENT OF D.C. CIRCUIT COURT OF APPEALS

Not to be Published—See Local Rule 8(f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[NO OPINION]

NO. 79-1513, 79-1514
SEPTEMBER TERM, 1980

WILLIAM R. WESSON,

Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA

Respondents

Filed March 25, 1981

GEORGE A. FISHER

Clerk

Petition on Review of an Order of the Interstate Commerce Commission.

Before: ROBB, WILKEY, AND GINSBURG, CIRCUIT JUDGES.

JUDGMENT

This case came on for consideration on petitions for review of an order of the Interstate Commerce Commission and on the briefs filed by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

Petitioners have engaged for several years in a quest to receive more for their Class B stock than they were allotted in the 1974 recapitalization of Missouri Pacific Railroad Company. They

have presented and re-presented their claim in several contexts and forums. We have reviewed the ponderous papers filed by the parties and the prior adjudications in point. Based on this review, we find the Commission's conclusion irresistible.

The matters petitioners would raise yet again have been carefully considered and rationally determined by several courts and by the Commission itself in earlier proceedings. No new issue of substance appears in the briefs before us. While we do not on this occasion enter a coercive order against petitioners, *cf. James C. Gabriel* v. *Missouri Pacific Railroad*, Civil No. 78-1476 (D.N.J. March 6, 1981) (adopting December 31, 1980 Magistrate's Report and Recommendation), we cannot conceive a case more appropriately subject to the law of res judicata. "Finality . . . is the service rendered by the courts through the operation of the law of res judicata." Restatement (Second) of Judgments, Introduction at 13 (Tent. Draft No. 7, 1980). By this order we perform that service.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed.

Per Curiam

For the Court

GEORGE A. FISHER
George A. Fisher, Clerk

Office - Supreme Court, U.S.
FILED
DEC 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-721

In The

Supreme Court of the United States

October Term, 1982

JAMES C. GABRIEL, Pro Se,

Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY OF MISSOURI, MISSOURI PACIFIC CORPORATION, M.M. HENNELLY, JOHN H. LLOYD, D.B. JENKS and THOMAS J. O'LEARY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

Reply to argument that Judge Lacey's order from which this appeal is taken, denied petitioner's fourth motion for reconsideration of Judge Sarokin's order of April 7, 1981.

The fourth motion for reconsideration was authorized by the Rules of the New Jersey District Court Rule 12-I This Rule 12-I states as follows:

> "Rule 12-I. A motion for reargument shall be served and filed within 14 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice, a memorandum setting forth concisely the matters

> or controlling decisions which counsel believes the Court has overlooked."

Petitioner followed Rule 12-I, serving with the memorandum concisely the matters or controlling decisions which petitioner believed the court had overlooked. In addition, petitioner was seeking the court's permission to have his first — one and only day in court before Judge Sarokin and before respondents' attorneys in order to thrash out his jury trial case in open court. Judge Sarokin denied petitioner even one day in the judge's court in the presence of respondents' attorneys.

Petitioner's complaint dated July 3, 1978, was to have a jury of his peers evaluate his property of MoPac Class B equity bearing common shares under due process of law according to the Fifth and Fourteenth Amendments. The Fifth Amendment states as follows:

> "No person shall be deprived of life, liberty, or property without due process of law".

Petitioner's complaint was to have a jury trial under Rule 38, Jury Trial of Right — (a) Right Preserved. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." (d). . . "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties". But Honorable Judge Sarokin had taken my Jury Rule 38, Jury Trial of Right case and instead of having a jury try my complaint No. 78-1476 in the United States District Court, District of New Jersey, the Honorable Judge gave petitioner's jury trial case to a magistrate to decide because Judge Sarokin told petitioner that he had "a heavy case load," and he was obliged to give it to a magistrate instead.

Judge Sarokin's order, permanently enjoining petitioner from instituting suit in the federal court against these respondents

regarding any matter alleged in the complaint that deals with the 1974 recapitalization of Missouri Pacific Railroad is against petitioner's constitutional rights to due process evaluation of his Class B property according to the Fifth and Fourteenth Amendments to the United States Constitution and according to Section 19a (49 U.S.C. §19a) "Valuation of Property of Carriers," to find the true value of petitioner's Class B shares in order to have them exchanged into new MoPac common shares. This is in accordance to the Supreme Court's holding in *Schwabacher v. United States,* 334 U.S. 201, where the terms of the plan of recapitalization of 1973-1974 had been imposed by the management interests which were adverse to petitioner's Class B MoPac common stock interests because Mississippi River Corporation, who concocted the 1974 Plan of Recapitalization was the owner of 63% or 1,158,395 shares of MoPac Class A $5 preferred $100 per share value stocks. Mississippi River Corporation has since 1963 elected the Board of Directors of Missouri Pacific Railroad (MoPac). Mississippi River Corporation which controlled MoPac's management and Board of Directors, had directed its Board of Directors to make an application to the I.C.C. under Section 20a (49 U.S.C. §20a) of the Interstate Commerce Act, to convert Mississippi own 63% Class A $5 preferred $100 per share value stocks and all other Class A stocks owned by others, into new MoPac Common equity bearing stocks, share for share, so that the Class A stockholders' equity of 34.5% on an I.C.C. accounting basis which was attributable to the Class A $5 preferred $100 per share value stocks was increased by the Plan of Recapitalization of 1974 to 74.5% of MoPac's equity, and the equity attributable to the Class B equity bearing common stocks was decreased from 65.5% to 25.5%.

Therefore, petitioner had voted against the 1974 Plan of Recapitalization because he did not wish to be plundered out of over 60% of his Class B equity, to have his Class B equity decreased from 65.5% to 25.5%, but petitioner instead sought due process evaluation of his Class B stocks according to the Fifth and Fourteenth Amendments — "No person shall be deprived

of life, liberty, or property, without due process of law," and according to *Schwabacher v. United States,* 334 U.S. 201, which states: "The Commission is under the duty to see that the minority interests are protected."

Honorable Judge Lacey did commit error in:

Directing the clerk not to accept, nor to docket nor to submit to the court any further papers in this case from petitioner except for notice of appeal which was done by the judge on defendants' advice in order to help demoralize petitioner by stopping him from defending his case which was a jury trial, Rule 38 Jury Trial Right case, but it was made into a magistrate's case by the Honorable Judge Sarokin because the judge told petitioner that he had a "heavy caseload." This was no valid excuse to make a jury trial case (Rule 38) into a magistrate's case. Thus, the judge was violating petitioner's rights to a jury trial according to Rule 38 — (a) Right Preserved. (d) "A demand for trial by jury as hereby provided may not be withdrawn without the consent of the parties."

All that petitioner was seeking was a jury trial for due process evaluation of his MoPac Class B common stocks under the Fifth and Fourteenth Amendments and under Section 19a of the Act for Valuation of Property of Carriers , to find petitioner's Class B true value, to exchange his Class B stock values into new MoPac common stock, true Class B values exchanged into new MoPac common stocks — which is according to the United States Supreme Court's holding in *Schwabacher v. United States,* 334 U.S. 201.

Petitioner denies respondents'statement that petitioner owns what was formerly Class B stock. In 1973 the 1974 Recapitalization Plan petitioner had voted against giving up his MoPac Class B stocks for a value of $2,450 per share, so that by voting against the approval of the MoPac Plan of Recapitalization on June 15, 1973, petitioner was seeking instead a due process evaluation of his Class B shares under the Fifth and Fourteenth Amendments,

in order to exchange his Class B common stocks into new MoPac common stocks, equal value for equal value, which is according to *Schwabacher v. United States,* 334 U.S. 201.

The federal courts never decided that plaintiff dissenter had no right to due process of law. To hold plaintiff dissenter in a class action is against due process of law. Due process of law had not been litigated, neither by the federal courts nor by the Interstate Commerce Commission. Plaintiff dissenter has a right to due process in accord with the principle of due process.

The prior case of *Levin v. Mississippi* never adjudicated the issues of the rights of a stockholder to be protected by the law in having the full market value of his property preserved under our principles of protecting property under due process. A property owner cannot have his property taken away from him at a price and a value arbitrarily established for settlement purposes and accepted by a majority of his stockholders. The plaintiff having dissented from the arbitrary value is entitled to his property properly evaluated under due process principles.

In this action the plaintiff dissenter having preserved his rights throughout the period of recapitalization and having voted against the Recapitalization Plan seeks to have his Class B stock evaluated in accord with the principle of due process.

What has not been adjudicated and is not res judicata is the right of the plaintiff dissenter to the Recapitalization Plan to have his stock evaluated. The plaintiff dissenter's rights to the true value of his property cannot be arbitrarily taken away from him either by a court judgment or by a vote of a majority of his fellow stockholders. The *Levin* Court never purported to set the actual value of the Class B stock, and never held that dissenters to the Recapitalization Plan were to be deprived of an objective evaluation of their property.

Neither the order of Judge Weinfeld, the vote of approval by the majority of MoPac stockholders, or the approval by the I.C.C. of the Recapitalization Plan, did or legally deprive plaintiff dissenter from his rights to have his property evaluated under due process of law.

The activity involved was one of recapitalization not condemnation of plaintiff's stocks. If plaintiff's fellow stockholders were satisfied to accept an agreed price for their property, that was their business. They had no authority to force an evaluation of plaintiff's property.

This nation is based on sanctity of private ownership, and no fellow stockholder could by a Recapitalization Plan fix the price of dissenting plaintiff's stock without his consent.

Judge Lacey's conclusion was not according to Rule 12-I of the New Jersey District Court Rules, when he stated that Rule 12-I authorized only a single motion for reargument. Petitioner was told by the court clerk supervisor that there is no limit for the number of motions and affidavits made providing you follow Rule 12-I of the New Jersey court rules. By reading Rule 12-I one can see that this is the case.

My brother Napoleon's case has nothing to do with my MoPac case in New Jersey. All these sanctions against petitioner by the Hon. Lacey's court suggested to the honorable judge by respondents, who up to now owe the United States government I.R.S. the sum of about $150,000,000 in capital gains taxes for the transfer of $615,000,000 to $800,000,000 in MoPac Class B cash and property values to the Class A. 63% of Class A $5 preferred stocks were owned by Mississippi River Corp. Mississippi River Corp. had gained over $250,000,000 in cash and property values by their Recapitalization Plan of 1973-1974 that Mississippi had concocted in order to plunder Class B stockholders' stocks.

In a jury trial case somewhat similar to the present case, Mr. Justice Black delivered the opinion of the Court in *Beacon Theatres*

v. Westover, U.S. District Judge, et al., 359 U.S. 500, in which he stated:

> "We granted certiorari, 356 U.S. 956, because maintenance of the jury as a factfinding body is of such importance that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost case." *Dimick v. Schiedt*, 293 U.S. 474, 486.

It is not frivolous or vexatious or abusive nor is it a vendetta nor harassment to seek due process evaluation of petitioner's Class B property under the Fifth and Fourteenth Amendments.

There was a conflict of interest by Alleghany Corporation because Alleghany kept its transaction on the Jones Motor Company Control and Pu[illegible]se and Control Erie Trucking Company, No. MC-F-10444, a secret from the Minority Class B. MPRR Common stockholders whom Alleghany was representing as a plaintiff in a MPRR Class Action under Rule 23(a), (b)(1) and (b)(2) of the Fed. Rules of Civil Procedure, for better Class B dividends as ordered by U.S.,D.J. Frederick van Pelt Bryan, dated N.Y., N.Y. October 9, 1968, with no intervenors after December 20, 1968, and then four years later the Class Action was made into a Plan of Recapitalization on the same pleadings of better dividends. *Alleghany was obliged to sell its Class B stocks in bulk at a cheap value in order to remain as a motor carrier subject to the plenary jurisdiction of the I.C.C. under part II of the Act in order to save itself from the annual 70% IRS penalty tax* because less than five individuals owned more that 50% of the Alleghany stock, but as a motor carrier subject to the plenary jurisdiction of the I.C.C. it was not subject to this penalty IRS annual tax. In addition, as a motor carrier, Alleghany was not subject to the *S.E.C.'s federal rules on securities.* Alleghany also kept these facts a secret from the Weinfeld court. As a Class B Minority stockholder representative, *Alleghany did not adequately and fairly protect the interests of the Class B stockholders; thus*

it violated Rule 28 and Rule 23 and Rule 23.1 of F.R.C.P. This action by Alleghany was fraud, which voids the MoPac class action under Class Action Rule 23.

Class Actions. — (a) Prerequisites to a Class Action. (4) "the representative parties will fairly and adequately protect the interets of the class." Alleghany did not protect the interests of Class B. *Since Alleghany's Voting Right Litigation Victory, in Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967), its ownership of the majority of Class B stocks gave Alleghany independent veto power over corporate action that required separate approval of B stock. *This was against the I.C.C.'s rules for a motor carrier such as Alleghany to have such control of MPRR.* So Alleghany had to sell its Class B stocks in bulk cheap to Mississippi River Corp. quickly, in order to remain under the I.C.C.'s plenary jurisdiction to save taxes and *money*, but Alleghany kept these above facts a secret. The fact that Alleghany kept these facts a secret in a Rule 23 Class Action, is *considered fraud, and in* Hazel-Atlas Glass Co. v. Hartford Empire Co., *322 U.S. 722, 64 S. Ct. 1281, 322 U.S. 233 (1944), "after discovered fraud warrants relief against a judgment regardless of the term at which it was finally entered."* Where there is fraud, res judicata does not apply. That is the reason why petitioner seeks due process evaluation of his Class B stocks.

Robert LeVasseur was also a Class B plaintiff in the same class action under Rule 23 Class Actions. *At the time of the Plan of Recapitalization, LeVasseur owned 3,000 Class A preferred shares and 336 shares of Class B common shares. He did not fairly and adequately protect the interests of the Class B stockholders.* His Class A $5 preferred stocks were converted share for share into new MPRR common stocks, and shares of new MoPac common stocks, now selling about $80 per share, or a total of about *$1,200,000.* The 3,000 Class A had a value of $100 per share, or a total of *$300,000. LeVasseu, as a representative party did not fairly and adequately protect the interests of the Class B stockholders,* according to Class Actions Rule 23(a)

Prerequisites to a Class Action. (4) "The representative parties will fairly and adequately protect the interests of the class," and (b) Class Actions Maintainable. "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied," which LeVasseur did not fairly and adequately protect the interests of the class he was supposed to be representing, the Class B stockholders. *This is fraud.* Where there is fraud, there is no res judicata.

The same conflict of interest under *Class Action Rule 23.1* had happened — by Betty Levin and Robert LeVasseur, who had asserted *certain claims derivatively on behalf of MoPac* (MPRR) at first. *Neither Robert LeVasseur nor Betty Levin, as Class B representatives, fairly and adequately protected the interests of the Class B stockholders.* Therefore, "The derivative action may not be maintained if it appears *that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.*" Neither of them made any effort to obtain any action from the directors or comparable authority or from the shareholders.

Therefore the derivative action under Class Action Rule 23.1 was not maintained. It appears that Betty Levin, the plaintiff who had brought the class action for better dividends, did not even vote her Class B shares in this class action that she brought about. It also appears from the voting record, that Robert LeVasseur did not vote his Class B shares in the class action. Therefore, I seek protection from injustice, by having my Class B shares evaluated under due process. I seek protection from plunderers of all kinds by having my MoPac Class B stocks evaluated by a jury trial in the United States District Court of New Jersey in Newark, New Jersey.

Therefore the *interests of the Class B shareholders were not fully and fairly represented in the prior litigation. The rights of Cl.B have not been terminated. The Class B certificates represent*

stock ownership in MPRR (MoPac). The Class B certificates evidence the right to due process evaluation under the Fifth and Fourteenth Amendments and Sec. 19a of the Act," Valuation of Property of Carriers, "to find true Class B value in order to exchange Class B into new MPRR common shares — value for value. *Therefore, Class B stock certificates have rights cognizable in the 1974 "Plan."* Class B certificates representing Class B MPRR equity-bearing common stocks must be evaluated by a jury in the lower court under due proces, acording to the Fifth and Fourteenth Amendments and by the lower court under Section 19a of the Act to *find Class B true value,* for its exchange into new MPRR common stocks.

Therefore, this MoPac stockholder prays that his Class B property be evaluated by a jury in the lower court under the Fifth and Fourteenth Amendments of the United States Constitution and according to Section 19a of the Interstate Commerce Act — "Valuation of property of carriers," to find the true value of his MoPac Class B shares so that he may become enabled to exchange the true value of his Class B shares for new MoPac common shares — *equal values given for equal values received in exchange,* which is according to *Schwabacher v. United States,* 334 U.S. 182 (1948) and *Otis and Co. v. S.E.C.,* 323 U.S. 624 (1945).

CONCLUSION

For the reasons stated herein and in the petition, it is respectfully requested that the writ be granted.

Respectfully submitted,

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